Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

DORIS DAY ANIMAL LEAGUE, MEDINA COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, VALLEY RIVER HUMANE SOCIETY, BOB BAKER, PUG HAVEN RESCUE FOUNDATION, DON CURRY,
Petitioners,

v.

ANN VENEMAN, Secretary
United States Department of Agriculture,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Department of Agriculture's regulatory definition of "retail pet store" is overly broad in violation of the Animal Welfare Act, 7 U.S.C. §§ 2131-2159 and Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as follows:

Petitioners: Doris Day Animal League, Medina County Society for the Prevention of Cruelty to Animals, Valley River Humane Society, Bob Baker, Pug Haven Rescue Foundation, and Don Curry appeared as plaintiffs in the U.S. District Court for the District of Columbia and appellees in the U.S. Court of Appeals for the D.C. Circuit. Petitioners are nonprofit organizations or individuals concerned about the humane treatment of animals intended for use as pets. No petitioner has a parent or publicly held company owning 10% or more of the corporation's stock.

Respondent: Daniel Glickman, in his official capacity as Secretary, United States Department of Agriculture; his successor, Ann Veneman, in her official capacity as Secretary, United States Department of Agriculture; Craig Reed, in his official capacity as Administrator, Animal Plant Health and Inspection Service, United States Department of Agriculture; his successor, Bobby Accord, in his official capacity as Administrator, Animal Plant Health and Inspection Service, United States Department of Agriculture, appeared as defendants in the U.S. District Court for the District of Columbia and appellants in the U.S. Court of Appeals for the D.C. Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Petition for a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. District Court for the District of Columbia in *Doris Day Animal League v. Veneman* is reported at 2001 U.S. Dist. LEXIS 23439 (D.D.C. 2001) and is reprinted in the Appendix at 1a (hereinafter "Pet. App."). The opinion of the U.S. Court of Appeals for the District of Columbia Circuit is reported at 315 F.3d 297 (D.C. Cir. 2003)

and in Pet. App. at 23a. The denial of the petition for rehearing en banc is reported at 2003 U.S. App. LEXIS 4823 (D.C. Cir. 2003) and in Pet. App. at 32a.

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the District of Columbia Circuit was filed on January 14, 2003. 315 F.3d 297 (D.C. Cir. 2003), Pet App. at 23a. The Court of Appeals order denying petitioners' request for rehearing en banc was filed on March 14, 2003. Pet App. at 32a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

The following statutes and regulations are set forth in the appendix:

The Animal Welfare Act, 7 U.S.C. §§ 2132, 2133 (2000) (Pet. App. at 33a, 37a).

USDA Animal Welfare Regulations, 9 C.F.R. § 1.1 (2003) (Pet. App. at 38a).

STATEMENT OF THE CASE

A. Basis Of Jurisdiction In Lower Courts

The U.S. District Court for the District of Columbia had jurisdiction over Doris Day Animal League's *et al* amended complaint under 7 U.S.C. § 2146(c) (jurisdiction of U.S. district courts) and 28 U.S.C. §§ 1331 (federal question), 1346 (U.S. defendant), 1361 (mandamus). The U.S. Court of Appeals for the District of Columbia Circuit had jurisdiction over United States Department of Agriculture's appeal under 28 U.S.C. § 1291 (final decision of district courts).

B. USDA's Failure To Properly Enforce The Animal Welfare Act

Throughout the country thousands of dogs and puppies are being subject to extremely inhumane and abusive conditions

at numerous commercial dog-breeding facilities. This widespread, and often shockingly, inhumane treatment of dogs and puppies has been widely reported in both the electronic and print media over a period of many years. The facilities of these inhumane dealers of dogs are commonly referred to as "puppy mills." Puppy mills continuously breed female dogs when they are in heat and then house these female dogs and their puppies in deplorable conditions. These puppy mills continue to proliferate and profit and regularly advertise both in newspapers and over the internet.

The Animal Welfare Act ("AWA") was specifically intended and designed to prevent this and other inhumane treatment of animals. In 1966, Congress first enacted the Federal Laboratory Animal Welfare Act to address the abuses that developed as a result of the nation's vast program of medical research, particularly research involving experimentation with animals. Pub. L. No. 89-544, 80 Stat. 359 (1966). In 1970, Congress passed the Animal Welfare Act of 1970, which expanded the coverage of the statute to include dealers of animals sold for use as pets. Pub. L. No. 91-579, 84 Stat. 1560 (1970). The 1970 amendments "established by law the humane ethic that animals should be accorded basic creature comforts of adequate housing, ample food and water, reasonable handling, decent sanitation, and sufficient ventilation." H.R. Rep. No. 91-1651 (1970), *reprinted in*, 1970 U.S.C.C.A.N. 5103, 5104.

As a result of the amendments made in 1970 and subsequent amendments made in 1976, the AWA now requires animal dealers to be licensed and to comply with the record keeping and humane handling, care, treatment, and transportation regulations established by USDA. Under the AWA, Congress intended anyone who sells animals for profit to comply with the provisions of the Act. 7 U.S.C. § 2132(f). There are only two limited exceptions to this broad statutory requirement. The first exemption is for a "retail pet store" and

the second exemption is for "any person" who sells animals, except wild animals, dogs, and cats, for less than five hundred dollars a year. *Id.*

Unfortunately, the United States Department of Agriculture ("USDA") defines a "retail pet store" in its regulations, beyond the plain and reasonable meaning of the term by extending the term to mean *"any outlet"* (barn, basement or backyard) where animals are sold at retail for use as pets. 9 C.F.R. § 1.1. Consequently, the "retail pet store" exemption extends to people who sells retail, no matter if they are selling animals from pet stores or their own residence. 64 Fed. Reg. 38,546, 38,547 (1999). As noted below, the dire result of USDA's overly broad exclusion is that a growing number of retail dealers, known as puppy mills, are selling and breeding animals, primarily dogs, on their own premises, and are profiting from raising animals in inhumane and unsanitary conditions. The court of appeals decision reversing the district court and upholding this unlawful regulation exempting all retail dealers from AWA humane care and treatment requirements, allows for the continuation of terrible suffering for thousands of puppies and dogs. Additionally, it nullifies any AWA protection for any animal sold retail.

Moreover, by upholding the USDA equation of the definition of a "retail pet store" with that of a "home," the court of appeals allows for an exponential increase in an agency's power to ignore the common and fair meaning of statutory words and instead to substitute illogical interpretations that may fit the agency's needs but thwart congressional intent. Finally, the precedent of arbitrarily equating "retail stores" with "homes" under the AWA could be expanded in a manner that would mean hardship and invasion of privacy for hundreds of thousands of individuals who sell items from their homes and could now find themselves potentially subject to licensing, zoning, sanitation and myriad other regulations.

C. Background Of Case

On June 22, 1995, pursuant to USDA's regulations, 7 C.F.R. § 1.28, and § 553 (e) of the Administrative Procedure Act, petitioner Doris Day Animal League ("DDAL") filed a petition for rulemaking with USDA notifying them that the agency was illegally exempting thousands of animals from the regulatory protections of the AWA. The petition explained that the agency's regulatory definition of "retail pet store" as any "outlet" was overly broad and contrary to the intent of Congress and language of the AWA. Pls. First Am. Compl. ¶ 57, Pet. App. at 70a.[1] To remedy this violation, petitioners requested that USDA narrow the definition of "retail pet store" to include only non-residential business establishments. *Id.*

After receiving no response from the agency regarding the petition, petitioner sent two letters requesting a response and threatening to seek judicial review if the agency did not respond. *Id.* ¶¶ 59-60, Pet. App at 71a. The agency failed to respond to petitioner's letters and provided no substantive response to the petition. Subsequently, petitioner sued for unreasonable delay and for violations of the AWA in U.S. District Court for the District of Columbia ~~on December~~ 19, 1996. *Id.* ¶ 61, Pet. App. at 71a. Later, the case was resolved after both parties agreed to a settlement and filed a Stipulation of Dismissal on March 12, 1997, whereby USDA agreed to consider the regulatory changes proposed in the petition. *Id.* ¶ 62, Pet. App. at 71a. On March 25, 1997, USDA published the petition in the Federal Register and requested comments.

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[1] Additionally, the petition notified USDA that its stated policy of exempting hunting, security, and breeding dog dealers from the protections in the agency's animal welfare regulations was contrary to the language and Congressional intent of the AWA. *Id.* Petitioners requested that USDA rescind the policy excluding all hunting, breeding, and security dog dealers from complying with USDA's regulations. *Id.*

62 Fed. Reg. 14,044 (1997). A total of 36,000 comments were received by the agency. Pls. First Am. Compl. ¶ 63, Pet. App. at 71a.

Finally, on July 19, 1999, four years after petitioner DDAL filed the petition, USDA issued a decision and policy statement in the Federal Register. 64 Fed. Reg. 38,546 (1999). Instead of granting the petition and conforming its regulations to the plain meaning of the AWA and the intent of Congress, USDA decided *not* to narrow the definition of "retail pet store." *Id.* [2]

D. Judicial Opinions

This is a dispute over USDA's exemption of thousands of animals from the regulatory protections of the AWA. Due to USDA's overly broad regulatory definition of "retail pet store," petitioners sued USDA in the U.S. District Court for the District of Columbia. The district court was guided by *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and reviewed the scope of the "retail pet store" exemption by examining the language and structure of the AWA. 2001 U.S. Dist. LEXIS 23439, *15-29 (2001), Pet. App. at 9a-17a. In applying the first step of *Chevron*, the court used the traditional tools of statutory construction, including examination of the statute's text, structure, legislative history, and purpose to determine the plain meaning of the Act. *Id.*

The district court found that the meaning of "retail pet store" is clear and "does not include persons who raise dogs

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[2] USDA decided to modify its policy and regulations by requiring the regulation of only wholesale dealers of hunting, breeding, and security dogs. On December 4, 2000, defendants issued a proposed rule to license only wholesale dealers of hunting, breeding, and security dogs, retailers were exempt. 65 Fed. Reg. 75,635 (2000). The district court stated that it lacked jurisdiction to review this claim because the proposed rule was not yet final. USDA finalized this rule on March 14, 2003. 68 Fed. Reg. 12,283 (2003)

and cats on their own premises for sale as pets." *Id.* at *18, Pet. App. at 11a. The court explained that "Congress made a conscious choice to use certain words and to discount others. Further, Congress intentionally chose the structure of the provision." *Id.* The district court noted that Congress carefully tailored the dealer and licensing provisions and accordingly held that it was inconsistent with the plain meaning of the AWA to squeeze residential retail dealers under the "retail pet store" exemption. *Id.* at *21, Pet. App. at 12a-13a. Based upon the text, structure, legislative history, and purpose of the AWA, the court concluded that defendants' regulatory definition of "retail pet store" was contrary to the plain meaning of the statute, overly broad and not entitled to deference. *Id.* at *28, Pet. App. at 17a. The court ruled for petitioners and USDA appealed.

The U.S. Court of Appeals for the District of Columbia Circuit reversed the lower court's decision. 315 F.3d 297 (D.C. Cir. 2003), Pet. App. at 23a. The court of appeals then conducted a cursory review of the meaning of the term within the statute as part of a truncated and misconstrued *Chevron* analysis. The court of appeals did not consider whether the agency's interpretation of the term "retail pet store" comported with the "ordinary and fair" definition of the term. Ultimately, the court of appeals found the USDA's regulatory definition a "permissible construction" of the AWA. *Id.* at 301, Pet. App. at 31a. On March 14, 2002, the court of appeals denied petitioners' petition for rehearing en banc. 2003 U.S. App. LEXIS 4823, Pet. App. at 32a.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DECISION ARBITRARILY NULLIFIES SIGNIFICANT PORTIONS OF THE ANIMAL WELFARE ACT AND CREATES NEW AND DANGEROUS JUDICIAL REVIEW STANDARDS THAT VIOLATE LONG STANDING SUPREME COURT PRECEDENT

The court of appeals decision upholding the expansion of the definition of "retail pet store" to include any and all retail dealers of animals has the breathtaking impact of nullifying all AWA protection of all pets sold for retail in the United States. Once all pet retailers are pushed into the "retail pet store" exemption there are no sellers of pets remaining to be regulated. This unprecedented agency amputation of the AWA thwarts both the goals and the provision of the statute. The court of appeals never recognized the scope and impact of its decision—never discussed that it was not only leaving puppy mills unregulated, but also all retail pet dealers. Clearly, this is an urgent issue for the Supreme Court to address.

Additionally, the court of appeals opinion is in direct conflict with the longstanding Supreme Court precedent for reviewing the plain meaning of statutory terms. *See Chevron*, 467 U.S. 837. Rather than thoroughly examining the language of the AWA, the court of appeals analysis focused on whether USDA's regulatory definition is "possible." This faulty analysis squarely conflicts with the Supreme Court's long line of statutory construction cases requiring review of the statute's express language. Most pointedly, if Congress intended to exempt all retail dealers of pets from the AWA's requirements, why did Congress instead, carve out a narrow exemption only for "retail pets stores" and provide several other provisions which specifically regulate other retail pet dealers?

Next, the court of appeals created a new and unfortunate precedent in its misguided understanding of the second step in the *Chevron* analysis. By solely relying on a review of the "reasonableness" of the agency's policy justifications for its action, the court of appeals failed to examine the fair and ordinary meaning of the term "retail pet store." *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 389-90 (1999). By ignoring this rule of statutory construction, the court of appeals failed to comport its review with longstanding Supreme Court precedent. This new and dangerous precedent involving the jettisoning of the "ordinary and fair" standard will result, as in this case, in massively expanding an agency's power to thwart the intent of Congress based upon the agency own policy decisions.

As a result of the court of appeals failure to accord the term "retail pet store" its fair and ordinary meaning, this decision could have the unintended effect of significantly disrupting current zoning, commercial and contract law. In the current case, making the terms "home" or "residence" synonymous with "retail store" allowed certain homeowners (namely those selling pets for retail) to escape regulation under the AWA. However, in the future, this illogical equating of "homes" with commercial businesses could have the opposite effect. If defining "homes" (from which items are sold) as "retail stores" were to become precedent, this could mean that everything from a garage sale to the sale of Girl Scout cookies from a home could transform such a home into a commercial business. Thereby, millions of homes might suddenly find themselves in violation of zoning regulations, sanitary and other commercial codes, local, state, and federal licensing provisions and any number of other regulations and laws. This would cause extraordinary hardship and invasion of privacy for homeowners and would create large-scale mischief and confusion in numerous areas of law.

A. The Panel Opinion Effectively Nullifies The Animal Welfare Act's Protections for Any Pets Sold In Retail

Congress passed the Animal Welfare Act of 1970 with the specific intent of expanding the coverage of the animal welfare statute to include retail and wholesale dealers of animals sold for use as pets. Pub. L. No. 91-579, 84 Stat. 1560 (1970). The 1970 amendments state that "Congress further finds it *essential* to regulate . . . the sale, housing care, handling and treatment of animals . . . by persons holding them for sale as pets . . ." 7 U.S.C. § 2131(b)(3) (emphasis added). Congress clearly mandates that whether the pet is sold in retail or wholesale it is entitled to protection under the AWA.

To ensure that the aims of the AWA were carried out Congress provided that anyone who sells animals for profit, whether as an individual or as a store, is required to be licensed and comply with the AWA humane care and treatment requirements. *Id.* at § 2132(f). Only two exceptions are provided for this broad statutory requirement. The first exemption is for "retail pet stores" that sell animals as pets and the second exemption is for "any person"[3] who sells animals, except wild animals, dogs, and cats, for less than five hundred dollars a year. *Id.*

As described *supra,* the USDA has illegally expanded the retail pet store exemption so that all "persons" or individuals who sell animals as pets, including those sold from private residences, are now exempt from the AWA. Accordingly, any individual or "person" selling pets is automatically and illogically transformed into a "retail pet store." This means that, *inter alia,* all private residential sales of dogs, termed

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[3] A "person" is defined under the AWA as including "any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity." Id. § 2132(a).

"puppy mills," are currently exempt from AWA coverage. As a result, each year untold thousand of puppies and dogs are subject to cruel and inhumane treatment. *See* Baker Decl. ¶ 3, Pet. App. at 101a-102a (observing terrible conditions at puppy mills, including "lack of veterinary care, lack of socialization, lack of nutrition, and lack of disease control. Animals are repeatedly housed in overcrowded cages that provide insufficient shelter from the elements. Lack of food and water is a very large problem.").

Due to these inhumane living conditions, many puppies sold from puppy mills suffer physical ailments and may also be aggressive or fearful of people or other animals. *See* Wilkes-Myers Decl. ¶ 26, Pet. App. at 86a (explaining that "some of the dogs suffered such severe abuse and neglect [at the puppy mill] that they will not make good pets. For example, some of the dogs shutter and shake, bite people out of fear, and defecate on themselves. Some of the dogs that were repeatedly bred have never walked on the ground. They have been in cages their whole life so they have terrible arthritis."). Repeatedly, people go out to buy that perfect puppy as a pet from these retail puppy mill dealers, who breed dogs on their own premises, only to find that the puppy they purchased is sick. *See* Curry Decl. ¶ 2, Pet. App. at 89a (responding to a newspaper advertisement, petitioner purchased a Pekingese puppy from a newspaper advertisement. He expected a healthy dog but did not even get home before the puppy became ill. He "took the dog to the veterinarian who said that the dog has intestinal problem from living in filthy conditions.").

Importantly, the USDA expansion of the narrow "retail pet store" exemption, not only exempts puppy mills from coverage, but also grants all individuals who sell pets retail an exemption from the AWA. The court of appeals decision supporting this agency action therefore, *sub silentio*, nullifies all the relevant provisions of the AWA designed to protect

pets sold in retail. This amounts to a nullification of many of the most significant provisions of the 1970 amendments to the AWA through an unprecedented gutting of an act of Congress by a regulatory agency. A court of appeals decision with little analysis, strips statutory protections from cruelty to the thousands of puppies and dogs in puppy mills, and more broadly from all animals sold in retail in the United States. Therefore, it warrants review by the Supreme Court.

B. The Court Of Appeals Erroneously Ignored The Language Congress Used In The Animal Welfare Act And Instead Looked At Whether USDA's Regulatory Definition Is "Possible."

In an attempt to rewrite *Chevron*, the court of appeals looked at dictionary definitions to review the plain meaning of "retail pet store" in the AWA. *See* 315 F.3d at 298. This is inconsistent with the long line of Supreme Court precedent stating that a plain meaning search starts with the express language of the statute. *See Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) (explaining that when construing a statute, the "starting point is the language of the statute.") citing *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985). This Court has explained that "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Altering the standards of statutory construction that this Court has consistently set-forth, the court of appeals appears to focus on whether USDA's definition is "possible," rather than thoroughly reviewing the express language of the AWA. This abbreviated and deferential approach to reviewing the plain meaning of a statute conflicts with the Supreme Court's well-established case law and should not be allowed to stand as a new precedent for statutory construction. *See Board of Governors of the Fed. Reserve Sys.*, 474 U.S. at 368 (explain-

ing that the "traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.").[4]

1. *The court of appeals failed to review the term "retail pet store" within the context of the Animal Welfare Act*

The court of appeals deviated from Supreme Court precedent by failing to conduct a thorough analysis of the meaning of "retail pet store" within the context of the statute. This Court has explained that the words of a statute may only become evident when read in the context of the statute. *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 132-33 (2000). In reviewing the meaning of "retail pet store" within the dealer and licensing provisions of the AWA, it is evident that Congress did not intend to exempt from regulation individuals who sell dogs and cats retail from their own premises as pets. If the court of appeals had conformed to the accepted standard of review of these provisions, then the court would have noticed that Congress intentionally chose to use certain words and not others in order to ensure a narrow construction of the AWA's "retail pet store" exemption.

In the AWA, Congress provides that a "dealer" is "any person" who for profit buys or sells animals to be used as pets.[5] 7 U.S.C. § 2132(f). A "person" is defined under the AWA to include "any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity." *Id.* § 2132(a). This broad definition demonstrates that Congress intended to include anyone who sells

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[4] The court of appeals even brushed passed the standard for reviewing an agency's interpretation of a statute. *See* 315 F.3d at 298, Pet. App. at 25a (stating that there "is no need to repeat the standards for reviewing an agency's interpretation of a statute it alone administers").

[5] A dealer also includes any person who buys or sells animals for profit to be used in research, teaching, or exhibition. 7 U.S.C. § 2132(f).

animals under the definition of "dealer." Congress identified only two limited exceptions to this broad statutory mandate by excluding: (1) a "*retail pet store* except such store which sells any animals to a research facility, an exhibitor, or a dealer" or (2) "*any person* who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat and who derives no more than $500 gross income from the sale of other animals during any calendar year." *Id.* § 2132(f)(i), (ii) (emphasis added). In light of the structure of the statute, these two exemptions should have been construed narrowly. *See e.g., Comm'r v. Clark*, 489 U.S. 726, 739 (1989) (explaining that statutory exceptions are to be construed "narrowly in order to preserve the primary operation of the provision); *see also Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (explaining that when Congress enumerates exceptions, "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

In failing to conduct a thorough contextual review of the language and structure of the AWA, the court of appeals virtually ignored the words carefully chosen by Congress. *See Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990) (explaining that "statutory interpretation begins with the language of the statute itself"). This is a significant error. A contextual review clearly reveals that Congress intentionally limited the scope of the "retail pet store" exemption. Congress could have phrased the first exemption to include both individuals selling from their residences and retail stores by stating that *any* "dealer" (or "person") who sells pets retail is excluded from AWA requirements. Congress did not do so. Instead, Congress limited the exemption from AWA requirements to only one class of "dealers" (or "persons"), namely "retail pet stores." Thus, Congress intentionally limited the scope of the retail pet store exemption. *See Brown*, 513 U.S. at 120 (stating that "where Congress includes particular language in one section

of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") citing *Russello v. United States*, 464 U.S. 16, 23 (1983).

To ignore the distinction between "retail pet store" and all other retail pet "dealers" the court of appeals is disregarding the premise that "Congress cannot be presumed to do a futile thing." *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997). Moreover, this Court has explained that it is presumed that "Congress legislates with knowledge of our basic rules of statutory construction." *McNary v. Haitian Refugee Ctr., Inc.* 498 U.S. 479, 496 (1991). Rather than review the distinction between "retail pet store" and other "dealers" within the context of the AWA, the court of appeals chose to ignore the intentional language chosen by Congress and defer to USDA's interpretation.[6] In essence the court of appeals rewrote the AWA to exclude *all* retail pet dealers from AWA requirements instead of only one subset of dealers—retail pet stores.

2. *The court of appeals failed to examine the Animal Welfare Act's statutory purpose*

This Court has explained that in "expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Dole*, 494 U.S. at 35 (citing *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)). In reviewing the plain meaning of "retail pet store" the court of appeals failed to adhere to this principle of judicial review. If the court of

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[6] In the licensing provision, Congress also took care to distinguish between a "retail pet store" and "other persons" who sell animals from their own premises. *See* 7 U.S.C. § 2133. As with the dealer provision, the court of appeals ignored the distinction between these terms and Congress' intention to not include individuals who sell dogs and cats from their own premises under the "retail pet store" exemption.

appeals had looked at the purpose of the AWA when reviewing the plain meaning of "retail pet store," then the court would have realized that excluding all animals sold retail from AWA protection is inconsistent with the AWA's purpose.

Defining "retail pet store" so as to exclude from AWA coverage all retail dealers, including those who sell animals from their own residence, is patently inconsistent with the AWA's broad purpose of insuring that animals intended for use as pets are provided humane care and treatment. 7 U.S.C. § 2131(b)(1). The legislative intent of the 1970 amendments was to expand "the perimeters of its protection to more animals and to more people who handle, exhibit, buy or sell, or transport them or who use them in the pursuit of medical and scientific knowledge." H.R. Rep. No. 91-1651, *reprinted in* 1970 U.S.C.C.A.N. 5103, 5104. USDA's regulatory exclusion of all retailers severely restricts and frustrates the broad protection Congress provided for animals intended as pets. *See Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (explaining that courts must reject administrative constructions of a statute that "are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.").

The court of appeal's decision failed to acknowledge the fundamental purpose of the 1970 AWA amendments. Instead, the court eliminated all retailers, a whole class of those intended to be regulated, from coverage under this act. This extraordinary thwarting of the stated purpose of the AWA runs directly counter to this Court's precedents and the clear intent of Congress.

C. The Court Of Appeals Opinion Conflicts With The Supreme Court's Well-Established Precedent For Determining Whether An Agency Acted Reasonably In Construing Statutory Terms.

The court of appeals opinion also directly conflicts with the Supreme Court's past rulings holding that an agency's interpretation of words within a statute must clearly comport with the "ordinary and fair" meaning of the term involved. *See AT&T Corp.*, 525 U.S. at 389-90. The court of appeals completely failed to apply this "ordinary and fair" test when reviewing whether USDA's definition of "retail pet store" is a reasonable interpretation under the AWA. Instead, as explained above, the panel used a test based on whether the agency definition of "retail pet store" is "possible." *See* 315 F.3d at 298, Pet. App. at 25a. The question of whether an agency interpretation of a key word in a statute should be its "ordinary and fair" meaning or merely a "possible" meaning represents a question of critical importance for curbing inappropriate agency power and for judicial review of agency action. If agencies are freed by the courts to use any "possible" meaning of statutory words when creating regulations, they will often be able, as in this case, to take *ultra vires* actions under the guise of obscure and illogical definitions of commonly understood terms.

Moreover, as a result of the court of appeals failure to accord the term "retail pet store" its fair and ordinary meaning, this decision could have the unintended effect of equating anyone who sells items retail from their own private home as a retail store, thereby causing substantial hardship and invasion of privacy for thousands of individuals who sell items from their homes.

1. *The court of appeals failed to review the ordinary and fair meaning of "retail pet store."*

By extending the definition of "retail pet store" to include any and all private sellers of pets, including those selling from their homes, the court of appeals repudiated a fundamental rule of judicial review of agency action, namely that such agency action cannot be upheld if the agency has departed from a realistic interpretation of the statute or its words. The Supreme Court has long held that regulations must be based on and consistent with the ordinary and fair meaning of a term or word. *See AT&T Corp.*, 525 U.S. at 389-90. Despite this rule of statutory construction, the court of appeals never even considered whether defining a private home as a "retail pet store" is the ordinary and fair meaning of the term "retail pet store." Instead of using this canon of judicial review, the court of appeal's opinion, citing selected dictionary definitions, states only that such a definition of "retail pet store" may be "possible." 315 F.3d at 298, Pet. App. at 25a.

Equating a "retail pet store" with a home or residence does not comport with the "ordinary or fair" meaning of either term. No one equates a "retail pet store" with a private home or barn. People do not say they are "going to buy something at the store" when they are going to buy something in someone's basement or garage. More specifically, the common understanding and dictionary definition of a home is a "private dwelling." Webster's Third International Dictionary, at 1082. "Private" is further defined as "restricted . . . not freely available to the public." *Id.* at 1804. The common definition of a store is a "commercial business establishment where goods are kept for retail sale." *Id.* at 2282. Retail stores are by necessity public and open to consumers. Private homes are not. This dichotomy explains why Congress exempted "retail pet stores" from the AWA. Retail stores are

scrutinized by the public and subject to commercial rules on sanitation, health codes, etc. Congress did not exempt private sellers of dogs and cats from AWA requirements because their homes and barns are not open to public scrutiny nor subject to commercial rules and regulations.

Even the USDA recognized that its definition of "retail pet stores" was not the common and ordinary meaning of the term. When denying petitioners' petition, USDA admitted that their regulatory interpretation of "retail pet store" includes "a very large number of facilities that are *not traditional pet stores*." Pet. App. at 114a (emphasis added). This admission was ignored by the court of appeals. Rather than limit the term "retail pet store" to a traditional store, USDA expands the meaning of this term to anyone who sells retail. The reasoning for this broad expansion is based upon policy arguments rather than the fair and ordinary meaning of the term. *See* 315 F.3d at 301, Pet. App. at 29a-31a. The court of appeals new statutory construction standard focuses *only* on USDA's policy considerations, instead of the fair and ordinary meaning of the term.

Courts should not be permitted to give agency's unlimited discretion in interpreting ambiguous terms. *Chevron* deference does not extend that far. This Court has explained that there needs to be a limiting standard in construing statutory terms that is "rationally related to the goals of the Act." *AT&T Corp.*, 525 U.S. at 388. There is no limiting standard within USDA's definition of "retail pet store," and therefore, everyone who sells retail is excluded from the AWA. This overly broad definition of "retail pet store" is inconsistent with the goals of the AWA—providing protection to more animals and regulating more people who sell animals intended to be used as pets. *See* H.R. Rep. No. 91-1651, *reprinted in* 1970 U.S.C.C.A.N. 5103, 5104. The court of appeals ignored the ordinary and fair meaning of the term "retail pet store" and instead, deferred to the agency. This

new standard for construing statutory terms is contrary to the Supreme Court's precedent, and consequently, should not be allowed to stand as precedent for how to construe statutory terms.

The failure of the court of appeals to utilize the appropriate "ordinary and fair" test on the USDA definition of "retail pet store" has significant implications beyond the facts in this case. Permitting a regulatory agency to arbitrarily jettison the "ordinary and fair" meaning of a term, and instead foray into the land of any "possible" meaning of a statutory term to further the agency's policy choices, would grant extra-ordinary new power and almost unlimited discretion to agencies. The grossly illogical result in this case, *i.e.*, equating retail stores with homes, demonstrates the profound repercussions involved in this novel and dangerous new standard, and how it could lead to agencies consistently and unilaterally thwarting the will of Congress.

2. *The decision by the court of appeals may subject homeowners to invasion of privacy and new state and local regulations*

The court of appeal's failure to utilize the "ordinary and fair" test on the USDA interpretation of "retail pet store" as mandated by prior precedent of the Supreme Court creates additional issues of exceptional importance. Not only does the panel's failure to comport with past precedent nullify many AWA goals and provisions, and significantly expand potentially illegitimate regulatory power of agencies, it also could seriously undermine the rights of hundreds of thousands of homeowners and cause significant confusion in, *inter alia*, commercial and property law.

The court of appeals itself makes a cursory reference to the potential sweeping damage this decision could cause when it notes that its view that a "home" can be defined as a "retail store" might be shared by "the local zoning authority." 315

F.3d at 298, Pet. App. at 25a. The court of appeals is only too correct in this aside. If all "homes" that sell items are seen to be legally synonymous with "retail stores"(i.e. commercial businesses) this view, as suggested by the court, might be one that would force local zoning authorities and all other regulators to enforce various health, safety, licensing and other codes and requirements on homes now suddenly viewed as "commercial establishments."

Ironically, part of the court of appeal's rationale for equating "homes" and "residences" with "retail stores" was to allow the private homes that sell pets to share in the retail store exemption from AWA requirements thereby, sparing them regulation. *Id.* at 301, Pet. App. at 31a. If it becomes precedent, however, the court of appeals opinion would have the opposite effect than that originally intended by the court of appeals. Far from sparing homeowners regulation, it could mean regulatory hardship and invasion of privacy for hundreds of thousands of individuals who sell items from their homes. The court of appeals opinion could be used to equate *anyone* who sells items retail from a private home or a retail store. This could mean that everything from a garage sale to the sale of Girl Scout cookies from a private residence could transform the residence into a commercial business. Numerous homeowners might suddenly find themselves in violation of zoning regulations, sanitary and commercial codes, licensing laws, and a variety of other laws and regulations. Due to the extraordinary legal confusion and the invasion of privacy and hardship the court of appeals opinion could cause among America's homeowners who sell items from their private homes, the Supreme Court should review the appeals court decision.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 12, 2003

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 00-1057 (CKK)

DORIS DAY ANIMAL LEAGUE, et al.,
Plaintiffs,

v.

ANN VENEMAN, Secretary,
Department of Agriculture, et al.,
Defendant.

July 30, 2001, Decided
July 30, 2001, Filed

MEMORANDUM OPINION

Plaintiffs[1] in this action bring suit against Ann Veneman, Secretary of the Department of Agriculture, and Craig Reed, Administrator of the Animal Plant Health and Inspection Service, (collectively "Defendants" or "USDA") for declaratory judgment and injunctive relief. Am. Compl. P 1. Plaintiffs assert that Defendants improperly regulate the trade in animals in violation of the Animal Welfare Act, 7 U.S.C. § 2131 et seq. ("AWA"), and the Administrative Procedure Act, 5 U.S.C. §§ 500-706 ("APA"). *See* Am. Compl. PP 2-3. Specifically, Plaintiffs allege in Count One that the USDA's definition of "retail pet store" is overly broad and,

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[1] The Plaintiffs in this suit are the Doris Day Animal League, the Medina County Society for the Prevention of Cruelty to Animals, the Valley River Humane Society, the Pug Haven Rescue Foundation, Bob Baker, and Don Curry.

consequently, in violation of the AWA and the APA. *Id.* PP 2, 77-84. Further, Plaintiffs allege in Count Two that the USDA's policy of exempting retail hunting, security, and breeding dog dealers from the AWA's licensing requirements violates the AWA and the APA. *Id.* PP 3, 85-90.

Presently pending are Defendants' Motion for Judgment on the Pleadings ("Defs.' Mot.") with respect to both counts pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and Plaintiffs' Cross Motion for Summary Judgment ("Pls.' Mot.") with respect to both counts pursuant to Rule 56(c). Upon consideration of Defendants' motion, Plaintiffs' cross motion, the parties' respective oppositions, and their replies,[2] the Court shall grant summary judgment in Plaintiffs' favor with respect to Count One and dismiss Count Two for lack of jurisdiction under the APA.

I. BACKGROUND

Congress enacted the AWA primarily to ensure [*4] the humane care and treatment of dogs, cats and other animals used for research, owned for exhibition purposes, or kept as pets. *See* 7 U.S.C. § 2131. The AWA requires certain dealers to obtain a license from the Secretary of Agriculture in order to buy or sell animals. 7 U.S.C. § 2134.[3] The AWA further

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[2] The Defendants have also filed a voluminous Administrative Record ("A.R."). Because the Court reaches its conclusions based on the plain meaning of the statute and the finality of one of the regulations at issue, it has no occasion to deferentially assess the reasonableness of the agency's actions. Accordingly, the Court has engaged in only a limited review of the Administrative Record.

[3] The statute provides in pertinent part:

> No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from

authorizes the Secretary of Agriculture to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." 7 U.S.C. § 2143(a)(1).[4] To obtain and maintain a license, a dealer must comply with the standards set forth by the Secretary. 7 U.S.C. § 2133.[5] The regulations that the USDA promulgated under the authority vested by the AWA are contained in Title Nine of the Code of Federal Regulations. *See* 9 C.F.R. § 1 *et seq.*

A. Provisions Governing Count One.

Under the precise definition contained in the AWA, a "dealer" is:

> Any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any

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> another dealer or exhibitor under this chapter any animal, unless and until such dealer or exhibitor shall have obtained a license from the Secretary.

7 U.S.C. § 2134 (emphasis added).

[4] The Secretary delegated responsibility for administering the AWA to the Administrator of the Animal and Plant Health Inspection Service ("APHIS") of the United States Department of Agriculture ("USDA").

[5] The statute provides in relevant part:

> The Secretary shall issue licenses to dealers and exhibitors upon application therefore in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: Provided, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title.

7 U.S.C. § 2133 (emphasis in original).

> dog for hunting, security, or breeding purposes, except that this term does not include—
>
> (i) a *retail pet store* except such store which sells any animals to a research facility, an exhibitor, or a dealer; or
>
> (ii) any person who does *not* sell, or negotiate the purchase or sale of any wild animal, *dog, or cat*, and who derives no more than $ 500 gross income from the sale of other animals during any calendar year.

7 U.S.C. § 2132(f) (emphasis added). As the express language of the definition indicates, a person who sells dogs and cats is not necessarily excepted from the definition of "dealer." *Id.* § 2132(f)(2)(ii). Such a person clearly does not fall into the second enumerated exception, and only falls into the first if the person's business qualifies as a "retail pet store" that does not sell animals to research facilities, exhibitors, or dealers. *Id.* § 2132(f)(2)(i).

In the AWA's licensing provision, most entities that qualify as "dealers" are required to obtain a license. *Id.* § 2133. However, the AWA exempts from the licensing provision

> any retail pet *store or other person* who derives less than a substantial portion of his income (as determined by the Secretary) from the breeding and raising of dogs or cats on his premises and sells any such dog or cat to a dealer or research facility.

Id. § 2133 (emphasis added). In other words, Congress does not require a "dealer" to obtain a license if the "dealer" is a "retail pet store" of any kind or if the "dealer" earns a comparatively small portion of his income by selling home-raised dogs and cats to dealers or research facilities. *Id.*

Notably, the AWA does not define "retail pet store." The USDA, however, defines a "retail pet store" as:

> *any outlet* where only the following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchilla, domestic ferrets, domestic farm animals, birds, and cold-blooded species.

9 C.F.R. § 1.1 (emphasis added). The USDA has expanded on this definition by commenting that "retail pet store" includes "all retail outlets regardless of volume, size, or location of business, . . . [a definition which encompasses] a very large number of facilities that are not traditional retail pet stores." A.R. at S2-00000003 (USDA's 1998 Regulatory Work Plan). As such, under the currently controlling definition of "retail pet store," all retail pet dealers, including those who sell animals for use as pets from their residence, are exempt from the AWA's licensing requirements. *See* 64 Fed. Reg. 38546-47.

Plaintiffs assert that the USDA's definition of "retail pet store" is overly broad in violation of the AWA and the APA. Am. Compl. P 2.

B. Provisions Governing Count Two.

As noted above, the AWA defines a "dealer" as:

> any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) *any dog for hunting, security, or breeding purposes*.

7 U.S.C. § 2132 (emphasis added). Further, the AWA provides that a "dealer" must have a license in order to (1) sell or offer to sell any animal to a research facility, or for exhibition or use as a pet, or (2) sell any animal to another dealer or

exhibitor. *See* 7 U.S.C. § 2134. In its current regulations, the USDA provides a definition of "dealer," 9 C.F.R. § 1.1, and requires *all* dealers, wholesale and retail, to obtain a license from the Secretary. 9 C.F.R. § 2.1.[6] Notwithstanding this broad licensing regulation, until recently the USDA did not, as a practical matter, regulate any dealers of dogs intended primarily for hunting, breeding, or security purposes. See Licensing Requirements for Dogs and Cats, 64 Fed. Reg. 38546, 38548 (July 19, 1999).

In response to a petition that Plaintiffs submitted to the USDA, the USDA announced that, in order to ensure harmony with the AWA's licensing requirements, it would "now require licensing and inspection for *wholesale* dealers of dogs intended primarily for hunting, breeding, and security purposes." *Id.*[7] The USDA recognizes that its revised interpretation of the AWA is not consistent with the existing regulations that do not presently distinguish between retail and wholesale dealers of hunting, breeding, and security dogs. Defs.' Reply to Mot. for J. on the Pleadings ("Defs.'

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[6] The USDA exempts certain entities from the licensing requirements, including "retail pet stores," any person "who derives no more than $500 gross income from the sale of such animals," and any person "who maintains a total of three or fewer breeding female dogs and or cats." 9 C.F.R. § 2.1.

[7] The USDA argues that its policy of only requiring licenses for *wholesale* dealers of dogs intended primarily for hunting, breeding, and security purposes is consistent with the plain language of the AWA. Defendants reason that "because hunting, breeding, and security dogs are, by definition, not sold for research, exhibition, or for use as a pet, the only instance where the licensing requirement would apply to a dealer of hunting, breeding, and security dogs is when the dealer either sells to or buys from another dealer." Defs.' Mot. for J. on the Pleadings ("Defs.' Mot.") at 31.

As explained in greater detail below, the Court does not address the validity and reasonableness of this argument because it finds that the broader issue is not ripe for review.

Reply") at 11; *see also* 9 C.F.R. § 1.1 (including both retail and wholesale dealers of such dogs in the definition of "dealer"). Further, the regulations require all such "dealers," wholesale and retail, to obtain a license from the Secretary. 9 C.F.R. § 2.1. In light of this conflicting position, the USDA issued a policy statement on July 19, 1999, in which it announced that it would shortly propose an amendment to conform its regulations with its revised interpretation of the AWA's licensing requirements. 64 Fed. Reg. at 38548. That proposal is pending at this time. *See* Licensing and Inspection Requirements for Dealers of Dogs Intended for Hunting, Breeding, or Security Purposes, 65 Fed. Reg. 75635 (Dec. 4, 2000).

Plaintiffs challenge the USDA's policy of regulating only wholesale dealers of hunting, breeding, and security dogs. Am. Compl. P 3. Plaintiffs contend that the policy improperly exempts retail dealers of such dogs from regulation in violation of the AWA and the APA. *Id.*

C. Procedural Background

On December 19, 1996, Plaintiffs filed suit against the USDA, challenging the agency's definition of "retail pet store" and seeking a court order requiring USDA to regulate *all* dealers of hunting, breeding, and security dogs. *See* Def.'s Mot. at 7 (citing *Doris Day Animal League v. Glickman*, Civ. Action No. 96-2806 (D.D.C. filed Dec. 19, 1996)). According to Defendants, the 1996 "lawsuit mirrored the substance of a Petition for Rulemaking that the [Plaintiffs] had previously filed with the Secretary" on June 22, 1995. Defs.' Mot. at 7. Plaintiffs received no response to the Petition or to subsequent letters that Plaintiffs sent to the USDA regarding the Petition. Pls.' Mot. at 5. Accordingly, Plaintiffs brought their 1996 suit for "unreasonable delay and for violations of Defendants' statutory mandate under the AWA." *Id.* The parties settled this issue in a Stipulation of Dismissal filed March 12, 1997, when the Secretary agreed to consider the

regulatory changes proposed in Plaintiffs' Petition. *Id.* Subsequently, the Secretary published Plaintiffs' Petition in the Federal Register and solicited public comments. *Id.*; *see also* 62 Fed. Reg. 14,044 (Mar. 25, 1997).

On July 19, 1999, Defendants issued a decision and policy statement in response to Plaintiffs' Petition in which they declined to narrow the definition of retail pet store and opted to modify its operational policy by requiring licensing only for wholesale dealers of hunting, breeding, and security dogs. *See* 64 Fed. Reg. 38, 546 (1999). On December 4, 2000, the Secretary published a Proposed Rule in the Federal Register limiting regulation to wholesale dealers of hunting, breeding, and security dogs and eliminating licensing requirements for "any retail outlet where dogs are sold for hunting, breeding, or security purposes." 65 Fed. Reg. at 75637. At the same time, Defendants solicited comments with regard to the Proposed Rule, and the Secretary later extended the deadline for submission of such comments to April 3, 2001. 66 Fed. Reg. 6491, 6491 (Jan. 22, 2001). Neither Plaintiffs nor Defendants have provided the Court with any material indicating that the USDA has since adopted the Proposed Rule in final form. Because Defendants' Proposed Rule effectively denies the majority of Plaintiffs' Petition, Plaintiffs brought this action on May 11, 2000. Am. Compl.[8]

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[8] In motions filed on February 7, 2001, both the American Kennel Club, Inc. ("AKA") and the Cat Fanciers' Association, Inc. ("CFA") sought the Court's leave to file amicus curiae briefs in support of Defendants' Motion for Summary Judgment. Plaintiffs did not consent to either motion. AKA Mot. at 1; CFA Mot. at 1.

"The decision whether to allow a non-party to participate as an *amicus curiae* is solely within the broad discretion of the Court." *Ellsworth Assoc., Inc. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996) (citing *Clark v. Sandusky*, 205 F.2d 915, 917 (7th Cir. 1953)). Generally, "a court may grant leave to appear as an *amicus* if the information offered is 'timely and useful.'" *Ellsworth Assoc., Inc.*, 917 F. Supp. at 846 (quoting *Waste Mgmt. of Pennsylvania v. City of New York*, 162 F.R.D. 34, 36

II. DISCUSSION

A. Count One

1. Standard of Review

Plaintiffs move for summary judgment with respect to Count One pursuant to Federal Rule of Civil Procedure 56(c). Pls.' Mot. at 7-8. A party is entitled to summary judgment if the pleadings, depositions, and affidavits demonstrate that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Tao v. Freeh*, 307 U.S. App. D.C. 185, 27 F.3d 635, 638 (D.C. Cir. 1994). In their opposition, Defendants do not argue that there is a genuine issue of material fact. *See* Defs.' Opp'n at 3-4. Rather, they contest Plaintiffs' assertion that they are entitled to judgment as a matter of law. *Id.* at 4. For the following reasons, the Court shall grant Plaintiffs' Cross Motion for Summary Judgment with respect to Count One.

2.USDA's Definition of "Retail Pet Store" Violates the AWA.

When a court analyzes an agency's interpretation of an act of Congress, it is guided by the Supreme Court's seminal decision in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). *E.g., Ariz. Pub. Serv. Co. v. EPA*, 341 U.S. App. D.C. 222, 211 F.3d 1280, 1287 (D.C. Cir. 2000); *Nat. Res. Def. Council v. Daley*, 341 U.S. App. D.C. 119, 209 F.3d 747, 752 (D.C. Cir. 2000); *GTE Serv. Corp. v. FCC*, 340 U.S. App. D.C. 308, 205 F.3d 416, 420-21 (D.C. Cir. 2000). Under *Chevron's* two-step test, the court's primary concern is "to ensure that an

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(M.D. Pa. 1995)). Because the Court finds that the non-party movants' proposed pleadings would not aid in the resolution of the pending dispositive motions, the Court denies their motions for leave to file the *amicus curiae* briefs.

agency acts within the bounds of congressional delegation. 'As long as the agency stays within [Congress'] delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference.'" *Ariz. Pub.*, 211 F.3d at 1287 (quoting *Arent v. Shalala*, 315 U.S. App. D.C. 49, 70 F.3d 610, 615 (D.C. Cir. 1995)).

Under the first step of *Chevron*, the reviewing court "must first exhaust the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue." *Nat. Res. Def. Council, Inc. v. Browner*, 313 U.S. App. D.C. 37, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843 n.9). Those traditional tools include examination of the statute's text, structure, legislative history, and purpose. *Daley*, 209 F.3d at 752; *GTE Serv. Corp.*, 205 F.3d at 420-21. If, upon application of these tools, "a statute is found to be plain in its meaning, 'then Congress has expressed its intention as to the question, and deference is not appropriate.'" *Ariz. Pub.*, 211 F.3d at 1287 (quoting *Bell Atlantic Tel. Cos. v. FCC*, 327 U.S. App. D.C. 390, 131 F.3d 1044, 1047 (D.C. Cir. 1997)). "If, however, 'the statute is silent or ambiguous with respect to the specific issue,' Congress has not spoken clearly, and a permissible agency interpretation of the statute merits judicial deference." *Daley*, 209 F.3d at 752 (quoting *Chevron*, 467 U.S. at 843); *GTE Serv. Corp.*, 205 F.3d at 421. When Congress' intent is unclear, a court moves to the second step of the Chevron analysis, and upholds an agency's interpretation as long as it is reasonable. *Ariz. Pub.*, 211 F.3d at 1287.

The issue presently before this Court relates to the scope of the AWA's exemption of "retail pet stores" from the definition of "dealer" and from the AWA's corresponding licensing requirements. Applying the first step of the *Chevron* analysis, this Court relies on the traditional tools of statutory construction and finds that the Act's plain meaning is clear.

The "retail pet store" exemption does not include persons who raise dogs and cats on their own premises for sale as pets.

In reaching this conclusion, the Court relies largely on the specific language of the statute and the structure of the exemptions. *Cf. Daley*, 209 F.3d at 752. Congress made a conscious choice to use certain words and to discount others. Further, Congress intentionally chose the structure of the provisions. Bearing in mind that "Congress cannot be presumed to do a futile thing," *Indep. Ins. Agents of America, Inc. v. Hawke*, 341 U.S. App. D.C. 211, 211 F.3d 638, 644 (D.C. Cir. 2000) (quoting *Halverson v. Slater*, 327 U.S. App. D.C. 97, 129 F.3d 180, 185 (D.C. Cir. 1997)), the Court finds that the statute's language and structure render its meaning plain.

The statutory provision that defines "dealer" and the separate provision that explains which "dealers" face licensing requirements both demonstrate the AWA's plain meaning. The Court assesses these provisions in sequence. Turning first to the statutory definition, the Court notes that the AWA plainly exempts two groups from the definition of "dealer": (1) retail pet stores that do not sell animals to research facilities, exhibitors, or dealers; and (2) persons who derive not more than $ 500 gross income from the sale of animals *other than* wild animals, dogs or cats. *See* 7 U.S.C. § 2132(f). Notably, Congress specifically chose to exclude from the second exemption a person who sells dogs or cats (regardless of the amount of money that person earns from such sales). *See id.* § 2132(f)(2)(ii). Unlike the first exemption, the second exemption does not include any restriction related to the uses for which animals may be sold. *See id.* In other words, the AWA's definition of "dealer" plainly includes a person who sells dogs or cats for whatever reason, including for use as a pet, even if that person makes less than $500 from such sales. However, the definition of

"retail pet store" contained in the USDA's regulations encompasses a person who sells dogs and cats from his [*20] residence for use as pets. *See* 9 C.F.R. § 1.1. Therefore, contrary to the AWA's plain meaning, the USDA's regulations place persons who sell dogs and cats from their home for use as pets into the first exemption, thereby relieving them from the licensing requirements that apply to dealers. Importantly, these are exactly the persons that Congress specifically *excluded* from the second exemption. If Congress wished to exempt such persons from classification as a "dealer" under the retail pet store exemption, then Congress would not have needed to specifically exclude such persons from the second exemption. Moreover, the fact that Congress carefully tailored the second exemption so as to exclude such persons convinces the Court that it is improper to shoehorn them into the first exemption. Accordingly, the Court finds that the USDA's definition of "retail pet store" is inconsistent with the plain meaning of the AWA provisions defining "dealer."[9]

The Court's conclusion in this regard is supported by a review of the separate provision that imposes licensing requirements on certain entities defined as dealers. Notably, the AWA exempts two categories of "dealers" from its licensing

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[9] Plaintiffs also claim that under the USDA's present definition of "retail pet store," the two exemptions to "dealer" are not only inconsistent but also redundant. *See* Pls.' Opp'n at 5; Pls.' Reply at 8. Although it finds that the two exemptions are inconsistent in their current regulatory form, the Court does not agree that the USDA's present definition of "retail pet store" renders the two exemptions redundant. Congress limited the first exemption in order to exclude stores that sell animals to research facilities, exhibitors, or dealers. 7 U.S.C. § 2132(f)(2)(i). There are no corresponding limits upon the uses for which animals may be sold in the second exemption. *Id.* § 2132(f)(2)(ii). Therefore, under the USDA's present definition of "retail pet store," a person who sells animals to another dealer would not qualify for the retail pet store exemption. Such a person *may*, however, be eligible for the second exemption.

requirements: (1) any retail pet store; and (2) other persons who derive less than a substantial portion of their income from raising dogs or cats on their own premises and selling them to dealers or research facilities. *See* 7 U.S.C. § 2133. Notably, by limiting the second exemption to persons who sell "to dealers or research facilities," Congress plainly imposed a restriction on the uses for which animals may be sold in order for a dealer to qualify for the exemption. *Id.* Thus, the second exemption does not apply to persons who sell animals for *use as a pet*. In other words, Congress took care to craft the exemption so as to exclude persons who derive any portion of their income from the sale of dogs and cats, which they bred or raised on their premises, for use as pets. *See id.* In apparent contravention of the statutory scheme, however, the USDA includes precisely such persons in the regulation that defines "retail pet store." 9 C.F.R. § 1.1. Therefore, contrary to the AWA's plain meaning, the USDA's regulations exempt persons who sell dogs and cats from their home for use as pets from the AWA's licensing requirements. But, as with the "dealer" classification explained above, these are exactly the persons that Congress specifically *excluded* from the second exemption. If Congress intended to include such persons in the definition of "retail pet store," thereby exempting such persons from the licensing requirements under the first exemption, then Congress would not have needed to specifically exclude such persons from the second exemption. Moreover, in light of the great precision with which Congress excluded such persons from the second exemption, the statute's plain meaning does not support an interpretation under which such persons are squeezed into the first exemption. Thus, the Court finds that the USDA's definition of "retail pet store" is inconsistent with the AWA's plain meaning regarding exemptions from the statute's licensing requirements.

In addition to an assessment of a statute's language and structure, a court may also consider the legislative history of a

statute under the first step of *Chevron* to determine whether Congress has spoken to the question at issue. *See Ariz. Pub.*, 211 F.3d at 1289-92; *Daley*, 209 F.3d at 752. Defendants rely heavily upon the legislative history to argue that its definition of "retail pet store" is proper. See Defs.' Mot. at 16-18. Defendants contend that "in the thirty years in which the existing definition of retail pet store has been in place, Congress has never expressed disapproval of the definition, despite amending the AWA several times, and its silence in this regard is evidence of its consent to the definition." Defs.' Mot. at 17-18 (citing *EEOC v. Assoc. Dry Goods Corp.*, 449 U.S. 590, 600 n.17, 66 L. Ed. 2d 762, 101 S. Ct. 817 (1981)). However, the Court notes that "even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171, 106 L. Ed. 2d 134, 109 S. Ct. 2854 (1989). If the Court were to "infer congressional approval of . . . [USDA's] rules because Congress did not amend the statute to explicitly repudiate them, the Court would in effect be insisting that a Congress legislatively reiterate an already clear statutory command in order to fend off an impermissible interpretation." Ohio *v. Dep't of Interior*, 880 F.2d 432, 458-59 (D.C. Cir. 1989).

Further, even though Congress amended the AWA several times, Defendants come forward with no indication, and the Court finds none, that Congress even considered the scope of the retail pet store exemption when it amended the AWA. *See* Defs.' Mot. at 17. In fact, Defendants themselves effectively concede as much by observing that, "in more recent amendments to the AWA, Congress has not addressed the scope of the retail pet store." *Id.*[10] In other words, Congress

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[10] The Conference Report accompanying the 1976 Amendments to the AWA states that "the House amendment does not disturb the coverage of retail pet stores under existing law." H.R. CONF. REP. 94-976, at 10

has taken no action on this matter, and "non-action by Congress is not often a useful guide." *American Fed'n of Labor & Cong. of Indus. Org. v. Donovan*, 757 F.2d 330, 344 n.11 (D.C. Cir. 1985) (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 76 L. Ed. 2d 157, 103 S. Ct. 2017 (1983)).

Defendants also look to the licensing provision in the House Report that accompanied the 1970 Amendments. Defs.' Mot. at 16-17. Specifically, they argue that the "only elaboration of the retail pet store exemption was the statement that ['']wholesale pet dealers or distributors are not exempt under this section.'" *Id.* (quoting H.R. REP. NO. 91-1651). Relying on that statement, Defendants conclude that "the explicit exclusion of wholesalers and distributors from the definition of retail pet store suggests that if Congress had intended to restrict the definition of retail pet store to 'nonresidential business establishments,' it would have done so explicitly." *Id.* at 17. The Court finds that Defendants' contorted reading of the statute is misleading. A proper reading of the exemption demonstrates that Congress created two categories of exemptions: (1) retail pet stores, and (2) "other persons who derive less than a substantial amount of their income (as determined by the Secretary) from the breeding and raising of dogs and cats on their own premises and who sell such animals to a dealer or research facility are not required to obtain a license." H.R. REP. NO. 91-1651. After this statement, the Report expressly provides that "wholesale pet dealers or distributors are not exempt under this section." *Id.* Congress' intent is clear from the statement concerning the two categories of exemptions. "Other persons" who derive a less than substantial amount of their income

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(1976), *reprinted in* 1976 U.S.C.C.A.N. 783. Quite plainly, this statement is not an interpretation or elaboration of the scope of the retail pet store exemption.

from raising dogs and cats on their own premises and selling them *as pets* are not exempt from the licensing requirement. *See Id.*

Both parties also look to the purpose of the AWA to support their positions. Defs.' Mot. at 16, 19; Pls.' Opp'n at 6, 7; Pls.' Mot. at 10; Pls.' Reply at 9. As the 1970 House Report explicitly demonstrates, *see* H.R. REP. NO. 91-1651, Congress enacted the AWA to provide broader protection to more animals. *See id.; see also* Pls.' Mot. at 10; Pls.' Opp'n at 7. The Report states that the Act, as amended, "expands the perimeters of its protection to more animals and to more people who handle, exhibit, buy or sell, or transport them or who use them in the pursuit of medical and scientific knowledge." H.R. REP. NO. 91-1651.

Defendant, however, relies on an incomplete quotation from the same House Report to argue that the purpose of the bill is to "bring into the regulatory framework of the Act for the first time . . . wholesale pet dealers." Defs.' Mot. at 16 (quoting H.R. REP. NO. 91-1651) (emphasis added). Focusing on that language, Defendants assert that Congress focused on regulating wholesalers and not on regulating small breeders. *Id.* at 19. Accordingly, Defendants claim that the "Secretary's definition of retail pet store is in keeping with Congress' focus on wholesalers and away from small breeders." *Id.*

However, Defendants' contention is based upon an unduly limited citation to the House Report. The full provision states that "the bill regulates more people who handle animals. It will, *for example*, bring into the regulatory framework of the Act for the first time exhibitors (such as circuses, zoos, carnivals, and road shows) and wholesale pet dealers." H.R. REP. NO. 91-1651 (emphasis added). The Congressional language demonstrates that the purpose was to provide broader protection. Congress listed wholesale pet dealers as an example, rather than as the exclusive category covered by the amended AWA. Defendants' reliance on only a piece of

the Report is entirely unavailing. The amendment itself and the report that accompanies it clearly demonstrate that Congress aimed to broaden the protections provided by the AWA.[11]

The text, structure, legislative history, and purpose of the AWA demonstrate that the plain meaning of "retail pet store" does not include a person who sells dogs and cats for use as pets from their own premises. Therefore, the USDA's overly broad definition of "retail pet store" is not entitled to deference, and there is no need for the Court to proceed to the second step of the *Chevron* analysis. Accordingly, Plaintiff is entitled to summary judgment on Count One pursuant to Rule 56(c) of the Federal Rules Civil Procedure.

B. Count Two

Defendants move to dismiss Plaintiffs' second claim for lack of subject matter jurisdiction under the APA, 5 U.S.C. § 704. Defs.' Mot. at 3. In the alternative, Defendants move for entry of judgment on the pleadings with respect to Plaintiffs' second claim pursuant to Federal Rule Civil Procedure 12(c). *Id.*[12] For the reasons explained below, the

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[11] This Court recognizes that "vague arguments as to the spirit of a . . . statute have little worth." *American Fed'n*, 757 F.2d at 344 (quoting *Johnson v. United States*, 163 Fed. 30, 31-32 (1st Cir. 1908)). While the Court may draw some guidance from general expressions of intent, the language of the statute itself provides the conclusive evidence of congressional purpose and intent. *See American Fed'n*, 757 F.2d at 344.

[12] The standard of review on a motion for judgment on the pleadings pursuant to Rule 12(c) is virtually identical to the standard applied to a motion to dismiss. *Transworld Prods. Co. v. Canteen Corp*, 908 F. Supp. 1, 2 (D.D.C. 1995) (quoting *Haynesworth v. Miller*, 261 U.S. App. D.C. 66, 820 F.2d 1245, 1254 (D.C. Cir. 1987)). Thus, "the Court will not dismiss plaintiff's complaint unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle plaintiff to relief." *Transworld Prods.*, 908 F. Supp. at 2 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).

Court shall grant Defendants' motion to dismiss for lack of jurisdiction under the APA. Therefore, an analysis of Defendants' alternative motion for judgment on the pleadings need not be addressed by the Court.

The Court lacks jurisdiction to consider Plaintiffs' APA challenge to the USDA's policy of exempting retail dealers of hunting, breeding and security dogs from regulation because the policy is not "final," and the APA expressly limits judicial review to "final" agency actions. *See* 5 U.S.C. § 704. This jurisdictional element of the APA "allows the agency an opportunity to apply its expertise and correct its mistakes, it avoids disrupting the agency's processes, and it relieves the courts from having to engage in 'piecemeal review which is at the least inefficient and upon completion of the agency process might prove to have been unnecessary.'" DRG *Funding Corp. v. Sec'y of Hous. & Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996) (quoting *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242, 66 L. Ed. 2d 416, 101 S. Ct. 488 (1980)). Therefore, if the agency action at issue is not "final," a federal court cannot reach the merits of the dispute. *Id.*

Both Defendants and Plaintiffs address the issue of finality. Defs.' Mot. at 26; Pls.' Opp'n to Defs.' Mot. for J. on the Pleadings ("Pls.' Opp'n") at 13. However, both parties address finality in the context of ripeness and refer to the two-part test articulated in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). *See* Defs.' Mot. at 24; Pls' Opp'n at 12.[13] The United States Court of Appeals for the District of Columbia Circuit has consistently recognized the significant overlap between

[13] The two-part ripeness analysis established by the Supreme Court in *Abbott Laboratories* requires courts to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149.

finality and ripeness, *see Am. Portland Cement Alliance v. EPA*, 322 U.S. App. D.C. 99, 101 F.3d 772, 777 (D.C. Cir. 1996); *see also Arizona v. Shalala*, 121 F. Supp. 2d 40, 47 (D.D.C. 2000), and it has recognized that the basic rationale asserted in *Abbott Laboratories* provides the starting point for both ripeness and finality analyses.[14] *See Action on Smoking & Health v. Dep't of Labor*, 307 U.S. App. D.C. 295, 28 F.3d 162, 164-65 (D.C. Cir. 1994). Although essentially intertwined with ripeness, finality is a separate jurisdictional element that the Court must address as a prerequisite to reviewing agency action under the APA. *See Shalala*, 121 F. Supp. 2d at 47.

The USDA's new policy, under which it requires only *wholesale* dealers of hunting, breeding and security dogs to comply with the AWA and exempts *retail* dealers from regulation, is presently in effect. 64 Fed. Reg. at 38548. However, that policy does not constitute "final agency action." On December 4, 2000, the USDA proposed an amendment to the regulations that would formally exclude retail dealers of hunting, breeding, and security dogs from regulation. 65 Fed. Reg. at 75635.[15] When the USDA

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[14] In *Abbott Laboratories*, the Supreme Court explained that the "basic rationale" underlying the doctrine of ripeness is:

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Labs., 387 U.S. at 148-49.

[15] The USDA's proposed amendment would change the definition of a "dealer" in the regulations. 65 Fed. Reg. at 75637. Specifically, 9 C.F.R. § 1.1 would be revised to read as follows:

> Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead . . . for research, teaching,

released its new policy on July 19, 1999, it also announced that it would subsequently "publish a document in the Federal Register to propose changing the [applicable] regulations." 64 Fed. Reg. at 38548. The USDA explained that the proposed change would "bring our regulations into accord with the AWA and with our new policy, now in effect, to regulate wholesale dealers of hunting, breeding, and security dogs. The proposal will also solicit public comment on the new policy." *Id.* (emphasis added). The newly proposed regulation, which was published on December 4, 2000, is presently pending in non-final form. Defs.' Mot. at 26. At the time the parties prepared their briefing on the pending motions, the notice and comment period on the proposed rule was still open, *see id.*, and neither the Plaintiffs nor the Defendants have alerted the Court that the proposed rule has since been finalized. In other words, it appears that the scope and shape of the USDA's final rule on the regulation of dealers of hunting, breeding, and security dogs is still in flux. *See Action on Smoking & Health*, 28 F.3d at 165. As such, it is impossible to know what rule will result. The comments that the USDA received during the notice and comment period may persuade the USDA that a different approach to the regulation of dealers of hunting, breeding, and security dogs is needed. *See id.* Where, as here, a proposed regulation is still in flux, review is premature, and a court has no jurisdiction under the APA. *See* 5 U.S.C. § 704; see *also Am. Portland Cement Alliance*, 101 F.3d at 777; Action *on Smoking & Health*, 28 F.3d at 164-650.

> testing, experimentation, exhibition, or for use as a pet; or any dog *at the wholesale level* for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); *any retail outlet where dogs are sold for hunting, breeding, or security purposes* . . . .

65 Fed. Reg. at 75637 (emphasis added).

III. CONCLUSION

For the reasons explained above, the Court shall grant Plaintiffs' motion for summary judgment with respect to Count One because Defendants' definition of "retail pet store" is overly broad and thus violates the plain language of the AWA. Further, the Court shall grant Defendants' motion to dismiss Count Two because the regulation in question is not yet final for purposes of APA review. The Court shall dismiss Count Two without prejudice, however, in order to afford Plaintiffs an opportunity to seek judicial review once the rule takes its final form. An Order accompanies this Memorandum Opinion.

July 30, 2001

COLLEEN KOLLAR-KOTELLY
United States District Judge

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is, this 30 of July, 2001, hereby

ORDERED that the Motion of the American Kennel Club, Inc. for Leave to Appear and File Brief *Amicus Curiae* [# 28] is DENIED; it is further

ORDERED that the Motion of the Cat Fanciers' Association, Inc. for Leave to File *Amicus Curiae* Brief [# 29] is DENIED; it is further

ORDERED that Defendants' Motion for Judgment on the Pleadings [# 27] is GRANTED with respect to Count Two and DENIED with respect to Count One; it is further

ORDERED that Plaintiffs' Cross Motion for Summary Judgment [# 26] is GRANTED with respect to Count One and DENIED with respect to Count Two; it is further

ORDERED that this case is dismissed from the docket of this Court and that this is a final, appealable Order.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5351

DORIS DAY ANIMAL LEAGUE, *et al.*,
Appellees,

v.

ANN M. VENEMAN, In her official capacity as Secretary, United States Department of Agriculture, *et al.*,
Appellants.

November 4, 2002, Argued
January 14, 2003, Decided

OPINION

Before RANDOLPH and ROGERS, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*. Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, *Circuit Judge*: Hundreds of thousands of dog breeders throughout the United States raise and sell puppies from their homes. The Animal Welfare Act requires certain animal "dealers" to be licensed and to submit to inspections. The Act, which is administered by the Department of Agriculture, exempts "retail pet stores" from these requirements. The Secretary defines "retail pet store" as "any outlet where only the following animals are sold or offered for sale, at retail for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchilla, domestic ferrets, domestic farm animals, birds, and cold-

blooded species." 9 C.F.R. § 1.1. The effect of this regulation is to exempt breeders who sell dogs as pets from their residences. The issue is whether the regulation is valid.

Doris Day Animal League, a membership organization, filed a rulemaking petition with the Agriculture Department, urging a change in the regulatory definition of "retail pet store" so that residential operations would not be exempted. The Secretary published the petition in the Federal Register (62 Fed. Reg. 14,044 (Mar. 25, 1997)) and received more than 36,000 comments. When the Secretary announced that he would retain the definition, and stated the reasons why, 64 Fed. Reg. 38,546 (July 19, 1999), Doris Day Animal League and other organizations and individuals concerned about the mistreatment of dogs brought this action for judicial review.

The Animal Welfare Act, 7 U.S.C. § 2131 *et seq.*, seeks to insure the humane treatment of dogs (and other animals) raised and sold at wholesale and retail for research, for exhibitions, for hunting, to serve as guard dogs, and to be pets. *Id.* § 2131(1). Animal dealers must obtain licenses, they must comply with standards governing the handling, care, treatment, and transportation of the animals, and their facilities may be inspected for compliance. *See id.* §§ 2133, 2143, 2146(a). The Act defines "dealer" to exclude "a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer." *Id.* § 2132(f)(2)(i). The Act does not define "retail pet store." Pursuant to rulemaking authority in 7 U.S.C. § 2151, the Secretary promulgated the regulation, quoted above, defining "retail pet store." The regulation's basic definition of "retail pet store" to mean "any outlet," without distinguishing homes from traditional business locations, dates back to 1971. *See* 36 Fed. Reg. 24,919 (Dec. 24, 1971) (§ 1.1(t) of the regulations: "'Retail pet store' means any retail outlet where animals are sold only as pets at retail.").

The district court viewed the meaning of "retail pet store" as plainly not including one who sells dogs for use as pets from his residence, and therefore held the regulation invalid. *Doris Day Animal League v. Veneman*, 2001 U.S. Dist. LEXIS 23439, No. 00-1057, mem. op. at 15 (D.D.C. July 30, 2001). The court relied on the specific exemptions in the definition of "dealer" in 7 U.S.C. § 2132(f) and the licensing exemption of § 2133.

There is no need to repeat the standards for reviewing an agency's interpretation of a statute it alone administers. *See Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 338 U.S. App. D.C. 282, 194 F.3d 72, 75-77 (D.C. Cir. 1999). The question is what "retail pet store" in § 2132(f)(2)(i) means, or more precisely, what Congress intended it to mean. Those who sell dogs as pets to consumers from their residences are selling pets at retail. But is a residence a "store"? One usually thinks of a store as a business open to the public and engaged in the sale of goods. But not all stores are open to the public and not all stores are located in shopping malls or other typical business locations. If a homeowner raised dogs; set up a separate place on his property—say, for instance, a small building; installed a counter and a cash register; displayed leashes, collars, and other dog paraphernalia for sale; and advertised the sale of puppies at his address, it would not be much of a stretch to view this too as a store. The local zoning authority might also view the matter that way.

The government cites a dictionary to show that treating residences as "retail pet stores" is possible. One definition of "store" is "a business establishment where goods are kept for retail sale." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2252 (1986). But what is a "business" and what is an "establishment"? A "business" is a "commercial or mercantile activity customarily engaged in as a means of livelihood," *id.* at 302, and an "establishment" is a "more or

less fixed and usu. sizable place of business or residence together with all the things that are an essential part of it." *Id.* at 778. WEBSTER'S lexicographers thus might say that because a residence can be a "business establishment," a residence can be viewed as a "retail pet store" if dogs are sold there. Those at BLACK'S LAW DICTIONARY (7th ed. 1999), would get to the same conclusion by a more direct route. BLACK'S defines "store" as a "place where goods are deposited to be purchased or sold." *Id.* at 1432. Residences are of course places and dogs can be considered "goods." Still, we do not pretend these dictionaries, or any others, provide a complete refutation of plaintiffs' contention that the so-called plain meaning of "retail pet store" excludes residences, or that the opposite is what Congress clearly had in mind. Whatever the printed dictionaries say, we cannot be sure what was in the mental dictionaries of the members of Congress. And so we will move on.

Both sides rely on statements from the legislative history of the Animal Welfare Act. The government and *amicus* American Kennel Club, Inc., say the legislative history reveals that the emphasis of the Act was on regulation of wholesale, not retail, sellers of animals. Plaintiffs point to other statements suggesting that the exemption for retail pet stores should be construed narrowly. In the end we can find no solid evidence showing that Congress came to any conclusion about the issue we face, one way or the other.

Plaintiffs' more serious claim, one that convinced the district court, rests on the structure of 7 U.S.C. § 2132(f), the provision defining "dealer." The definition of "dealer" has two exceptions. The first we have already mentioned: it provides that "dealer" does not include a "retail pet store" (unless the animals are sold to a research facility, exhibitor, or dealer). *Id.* § 2132(f)(2)(i). The second excludes from the definition of dealer "any person who does not sell, or

negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $ 500 gross income from the sale of other animals during any calendar year." *Id.* § 2132(f)(2)(ii). One of plaintiffs' arguments is that by not giving sellers of dogs a *de minimis* ($500) exemption in subsection (ii), Congress meant to make sure that those who sold dogs from their homes remained covered by the Act no matter how much income they generated. But the argument begs the question. If subsection (i) already gave an exemption to residential sellers of dogs as pets (because they were "retail pet stores"), there was no need to give them a *de minimis* exemption in subsection (ii). Plaintiffs also point out that if Congress had wanted to exempt individuals selling dogs from their homes, it could easily have written subsection (i) to cover "any person" rather than "retail pet store," as it did in subsection (ii). The argument is weak. It may be countered by arguing that if Congress wanted to exclude residential sellers from the definition of retail pet store it easily could have said as much. The argument is, in any event, one that can be made in any case in which there is a fair dispute about the meaning of a statute. Often it is put this way: Congress knows how to say thus and so, and would have written thus and so if that is what it really intended. This proves very little. Congress almost always could write a provision in a way more clearly favoring one side—or the other—in a dispute over the interpretation of a statute. Its failure to speak with clarity signifies only that there is room for disagreement about the statute's meaning.

Plaintiffs also direct us to the licensing exemption contained in § 2133. The relevant portion reads:

> any retail pet store or other person who derives less than a substantial portion of his income (as determined by the Secretary) from the breeding and raising of dogs or cats on his own premises and sells any such dog or cat to a

> dealer or research facility shall not be required to obtain a license as a dealer. . . .

The argument is that § 2133 reflects two separate and distinct licensing exemptions for dog sellers: "retail pet stores" and "other persons." The second category, plaintiffs continue, "does not apply to persons who sell dogs or cats to consumers for use as pets from their own premises." Therefore Congress intended to keep the categories separate, while the regulatory definition of "retail pet store" lumps them together.

We will assume that the "other person" clause applies only to those persons who are selling dogs and cats to dealers and research facilities, rather than to consumers who want the animals for pets. Even so, we cannot see how this helps plaintiffs' contention that the plain meaning of "retail pet store" does not include residences. Plaintiffs read the qualification—breeding and raising dogs and cats, on the person's premises, as a result of which he does not derive a substantial part of his income, and selling to dealers and research facilities—to refer only to "other person," not to "retail pet store." Because of the disjunctive "or" in the passage, *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 1234, 152 L. Ed. 2d 258 (2002), supports their interpretation. But even if plaintiffs are correct about what § 2133 means, which we need not decide, those "other" persons are not within the Secretary's definition of "retail pet store" for the obvious reason that they are not selling at retail. Under the regulation, residential retail sellers, like traditional pet stores, are exempt from licensing regardless of whether they make a substantial part of their income from this activity. If the Secretary's interpretation of "retail pet store" is correct, it would have been senseless for Congress to add retail residential sellers in the "other person" clause of § 2133; that would have created a redundancy, or an overlap between the two classes exempt from licensing. Given the regulation, a residential seller may sell an unlimited number of dogs to the

public as pets, but he may sell outside of retail channels only if his sales of dogs are less than a substantial portion of his income. The regulation thus preserves both parts of § 2133, allowing each to operate in its sphere.

While the regulation's definition of "retail pet store" does not exactly leap from the page, there is enough play in the language of the Act to preclude us from saying that Congress has spoken to the issue with clarity. From what we can make out, Congress has paid little attention to the question posed in this case. Still, it is true that in the years since passage of the Act and the Secretary's adoption of the regulation, Congress has not altered the regulatory definition of "retail pet store" although it has amended the act three times. One line of Supreme Court cases holds that "when Congress revisits a statute giving rise to a long-standing administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846, 92 L. Ed. 2d 675, 106 S. Ct. 3245 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, 40 L. Ed. 2d 134, 94 S. Ct. 1757 (1974)). The quotation fits this case perfectly. *Compare Alexander v. Sandoval*, 532 U.S. 275, 292, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001), refusing to find that Congress, through silence, had endorsed a judicial interpretation of a statute. *But see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82, 72 L. Ed. 2d 182, 102 S. Ct. 1825 (1982).

This leaves the argument that the Secretary's resolution of the meaning of "retail pet store" is not a reasonable one. In our judgment the Secretary's decision and policy statement declining to modify the regulation is supported with reasoning that is persuasive and faithful to the Act's purpose of protecting animal welfare. *See generally* Licensing Requirements for Dogs and Cats, 64 Fed. Reg. 38,546 (July 19, 1999).

The Secretary spelled out several policy considerations thus:

> Second, we have determined that retail dealers, especially those who sell from their homes, are already subject to a degree of self-regulation and oversight by persons who purchase animals from the retailers' homes, as well as by breed and registry organizations. Breed and registry organizations, such as kennel clubs, require their registrants to meet certain guidelines related to the health and genetic makeup of animals bred and to the education of the registrants. These organizations also monitor the conditions under which animals are bred and raised. Wholesale dealers typically do not have this type of oversight from the public.
>
> . . . . Fourth, retail outlets are not unregulated. There are already many State and local laws and ordinances in place to monitor and respond to allegations of inhumane treatment of and inadequate housing for animals owned by private retail dealers. If we were to regulate these dealers along with State and local officials, it would clearly not be the most efficient use of our resources.

Id. at 38,547. While plaintiffs are unhappy about the degree of self-regulation and the amount of oversight from local humane societies, kennel clubs, and state agencies, the Secretary, applying his expertise, was entitled to rely on these factors in making his judgment about the need for federal regulation. And he was entitled also to differentiate retail sales from wholesale sales of dogs on the basis that "wholesale dealers typically do not have this type of oversight from the public." *Id.*

The Secretary also declined to amend the definition on the ground that the best interest of animal welfare is supported by allowing the Department to "concentrate [its] resources on those facilities that present the greatest risk of noncompliance

with the regulations." *Id.* The Department has decided to focus on wholesale dealers, where its resources are likely to yield the greatest benefit. This is a reasonable choice, keeping in mind the purpose of the Act to promote animal welfare. *See Envirocare*, 194 F.3d at 77-78. It was also within the authority delegated to him by Congress for the Secretary to decline to amend the definition in light of the potential invasions of privacy that would result if federal inspectors began enforcing "cleaning, sanitation, handling, and other regulatory requirements in private homes." 64 Fed. Reg. at 38,547.

Taken together, the Secretary's decision to retain the regulatory definition of "retail pet store" reflects the judgment of the agency entrusted with administering the Animal Welfare Act to fulfill the purpose of the Act as effectively as possible. For the reasons given, the regulation is a permissible construction of the statutory term "retail pet store."

The order of the district court granting partial summary judgment to the plaintiffs and declaring the regulation invalid is therefore

Reversed.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed March 14, 2003]

No. 01-5351

DORIS DAY ANIMAL LEAGUE, *et al.*,
Appellees,

v.

ANN M. VENEMAN, in her official capacity as Secretary, United States Department of Agriculture and Craig Reed, in his official capacity as Administrator, Animal Plant Health and Inspection Service, United States Department of Agriculture,

Appellants.

OPINION

Before: GINSBURG, *Chief Judge*, and EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

ORDER

Upon consideration of appellees' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

APPENDIX D

TITLE 7.—AGRICULTURE

CHAPTER 54.—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

7 USCS § 2132 (2003)

§ 2132. Definitions

When used in this Act [7 USCS §§ 2131 et seq.]—

(a) The term "person" includes any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity;

(b) The term "Secretary" means the Secretary of Agriculture of the United States or his representative who shall be an employee of the United States Department of Agriculture;

(c) The term "commerce" means trade, traffic, transportation, or other commerce—

(1) between a place in a State and any place outside of such State, or between points within the same State but through any place outside thereof, or within any territory, possession, or the District of Columbia;

(2) which affects trade, traffic, transportation, or other commerce described in paragraph (1).[;]

(d) The term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or any other territory or possession of the United States;

(e) The term "research facility" means any school (except an elementary or secondary school), institution, organization, or person that uses or intends to use live animals in research, tests, or experiments, and that (1) purchases or transports live animals in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments: Provided, That the Secretary may exempt, by regulation, any such school, institution, organization, or person that does not use or intend to use live dogs or cats, except those schools, institutions, organizations, or persons, which use substantial numbers (as determined by the Secretary) of live animals the principal function of which schools, institutions, organizations, or persons, is biomedical research or testing, when in the judgment of the Secretary, any such exemption does not vitiate the purpose of this Act [7 USCS §§ 2131 et seq.];

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $ 500 gross income from the sale of other animals during any calendar year;

(g) The term "animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus Rattus, and mice of the genus Mus, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes;

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary;

(i) The term "intermediate handler" means any person including a department, agency, or instrumentality of the United States or of any State or local government (other than a dealer, research facility, exhibitor, any person excluded from the definition of a dealer, research facility, or exhibitor, an operator of an auction sale, or a carrier) who is engaged in any business in which he

receives custody of animals in connection with their transportation in commerce;

(j) The term "carrier" means the operator of any airline, railroad, motor carrier, shipping line, or other enterprise, which is engaged in the business of transporting any animals for hire;

(k) The term "Federal agency" means an Executive agency as such term is defined in section 105 of title 5, United States Code [5 USCS § 105], and with respect to any research facility means the agency from which the research facility receives a Federal award for the conduct of research, experimentation, or testing, involving the use of animals;

(*l*) The term "Federal award for the conduct of research, experimentation, or testing, involving the use of animals" means any mechanism (including a grant, award, loan, contract, or cooperative agreement) under which Federal funds are provided to support the conduct of such research.[;]

(m) The term "quorum" means a majority of the Committee members;

(n) The term "Committee" means the Institutional Animal Committee established under section 13(b) [7 USCS § 2143(b)]; and

(o) The term "Federal research facility" means each department, agency, or instrumentality of the United States which uses live animals for research or experimentation.

HISTORY: (Aug. 24, 1966, P.L. 89-544, § 2, 80 Stat. 350; Dec. 24, 1970, P.L. 91-579, § 3, 84 Stat. 1560; April 22, 1976, P.L. 94-279, §§ 3, 4, 90 Stat. 417, 418; Dec. 23, 1985, P.L. 99-198, Title XVII, Subtitle F, § 1756(a), 99 Stat. 1650.)

(As amended May 13, 2002, P.L. 107-171, Title X, Subtitle D, § 10301, 116 Stat. 491.)

TITLE 7.—AGRICULTURE

CHAPTER 54.—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

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7 USCS § 2133 (2003)

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§ 2133. Licensing of dealers and exhibitors

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to section 23 of this Act [7 USCS § 2153]: Provided, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 13 of this Act [7 USCS § 2143]: Provided, however, That any retail pet store or other person who derives less than a substantial portion of his income (as determined by the Secretary) from the breeding and raising of dogs or cats on his own premises and sells any such dog or cat to a dealer or research facility shall not be required to obtain a license as a dealer or exhibitor under this Act [7 USCS §§ 2131 *et seq.*]. The Secretary is further authorized to license, as dealers or exhibitors, persons who do not qualify as dealers or exhibitors within the meaning of this Act [7 USCS §§ 2131 *et seq.*] upon such persons' complying with the requirements specified above and agreeing, in writing, to comply with all the requirements of this Act [7 USCS §§ 2131 *et seq.*] and the regulations promulgated by the Secretary hereunder.

HISTORY: (Aug. 24, 1966, P.L. 89-544, § 3, 80 Stat. 351; Dec. 24, 1970, P.L. 91-579, § 4, 84 Stat. 1561.)

APPENDIX E

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

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9 CFR 1.1

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§ 1.1 Definitions.

[PUBLISHER'S NOTE: The definitions of "buffer area," "interactive area," "interactive session," "sanctuary area," and "swim-with-the dolphin (SWTD) program" were suspended for an indefinite period of time at 64 FR 15918, 15920, Apr. 2, 1999, effective Apr. 2, 1999.]

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

AC Regional Director means a veterinarian or his designee, employed by APHIS, who is assigned by the Administrator to supervise and perform the official work of APHIS in a given State or States. As used in part 2 of this subchapter, the AC Regional Director shall be deemed to be the person in charge of the official work of APHIS in the State in which the dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale has his principal place of business.

Act means the Act of August 24, 1966 (Pub. L. 89-544), (commonly known as the Laboratory Animal Welfare Act), as amended by the Act of December 24, 1970 (Pub. L. 91-579), (the Animal Welfare Act of 1970), the Act of April 22, 1976 (Pub. L. 94-279), (the Animal Welfare Act of 1976), and the Act of December 23, 1985 (Pub. L. 99-198), (the Food Security Act of 1985), and as it may be subsequently amended.

Activity means, for purposes of part 2, subpart C of this subchapter, those elements of research, testing, or teaching procedures that involve the care and use of animals.

Administrative unit means the organizational or management unit at the departmental level of a research facility.

Administrator means the Administrator of the Animal and Plant Health Inspection Service, U.S. Department of Agriculture, or any other official of the Animal and Plant Health Inspection Service to whom authority has been delegated to act in his stead.

Ambient temperature means the air temperature surrounding the animal.

Animal means any live or dead dog, cat, nonhuman primate, guinea pig, hamster, rabbit, or any other warmblooded animal, which is being used, or is intended for use for research, teaching, testing, experimentation, or exhibition purposes, or as a pet. This term excludes: Birds, rats of the genus Rattus and mice of the genus Mus bred for use in research, and horses not used for research purposes and other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs, including those used for hunting, security, or breeding purposes.

Animal act means any performance of animals where such animals are trained to perform some behavior or action or are part of a show, performance, or exhibition.

APHIS official means any person employed by the Department who is authorized to perform a function under the Act and the regulations in 9 CFR parts 1, 2, and 3.

Attending veterinarian means a person who has graduated from a veterinary school accredited by the American Veterinary Medical Association's Council on Education, or has a certificate issued by the American Veterinary Medical Association's Education Commission for Foreign Veterinary Graduates, or has received equivalent formal education as determined by the Administrator; has received training and/or experience in the care and management of the species being attended; and who has direct or delegated authority for activities involving animals at a facility subject to the jurisdiction of the Secretary.

Buffer area means that area in a primary enclosure for a swim-with-the-dolphin program that is off-limits to members of the public and that directly abuts the interactive area.

Business hours means a reasonable number of hours between 7 a.m. and 7 p.m., Monday through Friday, except for legal Federal holidays, each week of the year, during which inspections by APHIS may be made.

Business year means the 12-month period during which business is conducted, and may be either on a calendar or fiscal-year basis.

Carrier means the operator of any airline, railroad, motor carrier, shipping line, or other enterprise which is engaged in the business of transporting any animals for hire.

Cat means any live or dead cat (Felis catus) or any cat-hybrid cross.

Class "A" licensee (breeder) means a person subject to the licensing requirements under part 2 and meeting the definition of a "dealer" (§ 1.1), and whose business involving animals consists only of animals that are bred and raised on the premises in a closed or stable colony and those animals acquired for the sole purpose of maintaining or enhancing the breeding colony.

Class "B" licensee means a person subject to the licensing requirements under part 2 and meeting the definition of a "dealer" (§ 1.1), and whose business includes the purchase and/or resale of any animal. This term includes brokers, and operators of an auction sale, as such individuals negotiate or arrange for the purchase, sale, or transport of animals in commerce. Such individuals do not usually take actual physical possession or control of the animals, and do not usually hold animals in any facilities. A class "B" licensee may also exhibit animals as a minor part of the business.

Class "C" licensee (exhibitor) means a person subject to the licensing requirements under part 2 and meeting the definition of an "exhibitor" (§ 1.1), and whose business involves the showing or displaying of animals to the public. A class "C" licensee may buy and sell animals as a minor part of the business in order to maintain or add to his animal collection.

Commerce means trade, traffic, transportation, or other commerce:

(1) Between a place in a State and any place outside of such State, including any foreign country, or between points within the same State but through any place outside thereof, or within any territory, possession, or the District of Columbia; or

(2) Which affects the commerce described in this part.

Committee means the Institutional Animal Care and Use Committee (IACUC) established under section 13(b) of the Act. It shall consist of at least three (3) members, one of whom is the attending veterinarian of the research facility and one of whom is not affiliated in any way with the facility other than as a member of the committee, however, if the research facility has more than one Doctor of Veterinary Medicine (DVM), another DVM with delegated program responsibility may serve. The research facility shall establish the Committee for the purpose of evaluating the care, treatment, housing, and use of animals, and for certifying compliance with the Act by the research facility.

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $ 500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats during any calendar year.

Department means the U.S. Department of Agriculture.

Deputy Administrator means the Deputy Administrator for Animal Care (AC) or any other official of AC to whom authority has been delegated to act in his stead.

Dog means any live or dead dog (Canis familiaris) or any dog-hybrid cross.

Dwarf hamster means any species of hamster such as the Chinese and Armenian species whose adult body size is substantially less than that attained by the Syrian or Golden species of hamsters.

Endangered species means those species defined in the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and as it may be subsequently amended.

Euthanasia means the humane destruction of an animal accomplished by a method that produces rapid unconsciousness and subsequent death without evidence of pain or distress, or a method that utilizes anesthesia produced by an agent that causes painless loss of consciousness and subsequent death.

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

Exotic animal means any animal not identified in the definition of "animal" provided in this part that is native to a foreign country or of foreign origin or character, is not native to the United States, or was introduced from abroad. This term specifically includes animals such as, but not limited to, lions, tigers, leopards, elephants, camels, antelope, anteaters,

kangaroos, and water buffalo, and species of foreign domestic cattle, such as Ankole, Gayal, and Yak.

Farm animal means any domestic species of cattle, sheep, swine, goats, llamas, or horses, which are normally and have historically, been kept and raised on farms in the United States, and used or intended for use as food or fiber, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. This term also includes animals such as rabbits, mink, and chinchilla, when they are used solely for purposes of meat or fur, and animals such as horses and llamas when used solely as work and pack animals.

Federal agency means an Executive agency as such term is defined in section 105 of title 5, United States Code, and with respect to any research facility means the agency from which the research facility receives a Federal award for the conduct of research, experimentation, or testing involving the use of animals.

Federal award means any mechanism (including a grant, award, loan, contract, or cooperative agreement) under which Federal funds are used to support the conduct of research, experimentation, or testing, involving the use of animals. The permit system established under the authorities of the Endangered Species Act, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act, are not considered to be Federal awards under the Animal Welfare Act.

Federal research facility means each department, agency, or instrumentality of the United States which uses live animals for research or experimentation.

Field study means a study conducted on free-living wild animals in their natural habitat. However, this term excludes any study that involves an invasive procedure, harms, or materially alters the behavior of an animal under study.

Handling means petting, feeding, watering, cleaning, manipulating, loading, crating, shifting, transferring, immobilizing, restraining, treating, training, working and moving, or any similar activity with respect to any animal.

Housing facility means any land, premises, shed, barn, building, trailer, or other structure or area housing or intended to house animals.

Hybrid cross means an animal resulting from the cross-breeding between two different species or types of animals. Crosses between wild animal species, such as lions and tigers, are considered to be wild animals. Crosses between wild animal species and domestic animals, such as dogs and wolves or buffalo and domestic cattle, are considered to be domestic animals.

Impervious surface means a surface that does not permit the absorption of fluids. Such surfaces are those that can be thoroughly and repeatedly cleaned and disinfected, will not retain odors, and from which fluids bead up and run off or can be removed without their being absorbed into the surface material.

Indoor housing facility means any structure or building with environmental controls housing or intended to house animals and meeting the following three requirements:

(1) It must be capable of controlling the temperature within the building or structure within the limits set forth for that species of animal, of maintaining humidity levels of 30 to 70 percent and of rapidly eliminating odors from within the building; and

(2) It must be an enclosure created by the continuous connection of a roof, floor, and walls (a shed or barn set on top of the ground does not have a continuous connection between the walls and the ground unless a foundation and floor are provided); and

(3) It must have at least one door for entry and exit that can be opened and closed (any windows or openings which provide natural light must be covered with a transparent material such as glass or hard plastic).

Interactive area means that area in a primary enclosure for a swim-with-the-dolphin program where an interactive session takes place.

Interactive session means a swim-with-the-dolphin program session where members of the public enter a primary enclosure to interact with cetaceans.

Intermediate handler means any person, including a department, agency, or instrumentality of the United States or of any State or local government (other than a dealer, research facility, exhibitor, any person excluded from the definition of a dealer, research facility, or exhibitor, an operator of an auction sale, or a carrier), who is engaged in any business in which he receives custody of animals in connection with their transportation in commerce.

Inspector means any person employed by the Department who is authorized to perform a function under the Act and the regulations in 9 CFR parts 1, 2, and 3.

Institutional official means the individual at a research facility who is authorized to legally commit on behalf of the research facility that the requirements of 9 CFR parts 1, 2, and 3 will be met.

Isolation in regard to marine mammals means the physical separation of animals to prevent contact and a separate, noncommon, water circulation and filtration system for the isolated animals.

Licensed veterinarian means a person who has graduated from an accredited school of veterinary medicine or has received equivalent formal education as determined by the Administrator, and who has a valid license to practice veterinary medicine in some State.

Licensee means any person licensed according to the provisions of the Act and the regulations in part 2 of this subchapter.

Major operative procedure means any surgical intervention that penetrates and exposes a body cavity or any procedure which produces permanent impairment of physical or physiological functions.

Minimum horizontal dimension (MHD) means the diameter of a circular pool of water, or in the case of a square, rectangle, oblong, or other shape pool, the diameter of the largest circle that can be inserted within the confines of such a pool of water.

Mobile or traveling housing facility means a transporting vehicle such as a truck, trailer, or railway car, used to house animals while traveling for exhibition or public education purposes.

Nonconditioned animals means animals which have not been subjected to special care and treatment for sufficient time to stabilize, and where necessary, to improve their health.

Nonhuman primate means any nonhuman member of the highest order of mammals including prosimians, monkeys, and apes.

Operator of an auction sale means any person who is engaged in operating an auction at which animals are purchased or sold in commerce.

Outdoor housing facility means any structure, building, land, or premise, housing or intended to house animals, which does not meet the definition of any other type of housing facility provided in the regulations, and in which temperatures cannot be controlled within set limits.

Painful procedure as applied to any animal means any procedure that would reasonably be expected to cause more

than slight or momentary pain or distress in a human being to which that procedure was applied, that is, pain in excess of that caused by injections or other minor procedures.

Paralytic drug means a drug which causes partial or complete loss of muscle contraction and which has no anesthetic or analgesic properties, so that the animal cannot move, but is completely aware of its surroundings and can feel pain.

Person means any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.

Pet animal means any animal that has commonly been kept as a pet in family households in the United States, such as dogs, cats, guinea pigs, rabbits, and hamsters. This term excludes exotic animals and wild animals.

Positive physical contact means petting, stroking, or other touching, which is beneficial to the well-being of the animal.

Pound or shelter means a facility that accepts and/or seizes animals for the purpose of caring for them, placing them through adoption, or carrying out law enforcement, whether or not the facility is operated for profit.

Primary conveyance means the main method of transportation used to convey an animal from origin to destination, such as a motor vehicle, plane, ship, or train.

Primary enclosure means any structure or device used to restrict an animal or animals to a limited amount of space, such as a room, pen, run, cage, compartment, pool, or hutch.

Principal investigator means an employee of a research facility, or other person associated with a research facility, responsible for a proposal to conduct research and for the design and implementation of research involving animals.

Quorum means a majority of the Committee members.

Random source means dogs and cats obtained from animal pounds or shelters, auction sales, or from any person who did not breed and raise them on his or her premises.

Registrant means any research facility, carrier, intermediate handler, or exhibitor not required to be licensed under section 3 of the Act, registered pursuant to the provisions of the Act and the regulations in part 2 of this subchapter.

Research facility means any school (except an elementary or secondary school), institution, organization, or person that uses or intends to use live animals in research, tests, or experiments, and that (1) purchases or transports live animals in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments: Provided, That the Administrator may exempt, by regulation, any such school, institution, organization, or person that does not use or intend to use live dogs or cats, except those schools, institutions, organizations, or persons, which use substantial numbers (as determined by the Administrator) of live animals the principal function of which schools, institutions, organizations, or persons, is biomedical research or testing, when in the judgment of the Administrator, any such exemption does not vitiate the purpose of the Act.

Retail pet store means any outlet where only the following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchilla, domestic ferrets, domestic farm animals, birds, and coldblooded species. Such definition excludes—

(1) Establishments or persons who deal in dogs used for hunting, security, or breeding purposes;

(2) Establishments or persons exhibiting, selling, or offering to exhibit or sell any wild or exotic or other nonpet species of warmblooded animals (except birds),

such as skunks, raccoons, nonhuman primates, squirrels, ocelots, foxes, coyotes, etc.;

(3) Any establishment or person selling warmblooded animals (except birds, and laboratory rats and mice) for research or exhibition purposes; and

(4) Any establishment wholesaling any animals (except birds, rats and mice).

(5) Any establishment exhibiting pet animals in a room that is separate from or adjacent to the retail pet store, or in an outside area, or anywhere off the retail pet store premises.

Sanctuary area means that area in a primary enclosure for a swim-with-the-dolphin program that is off-limits to the public and that directly abuts the buffer area.

Sanitize means to make physically clean and to remove and destroy, to the maximum degree that is practical, agents injurious to health.

Secretary means the Secretary of Agriculture of the United States or his representative who shall be an employee of the Department.

Sheltered housing facility means a housing facility which provides the animals with shelter; protection from the elements; and protection from temperature extremes at all times. A sheltered housing facility may consist of runs or pens totally enclosed in a barn or building, or of connecting inside/outside runs or pens with the inside pens in a totally enclosed building.

Standards means the requirements with respect to the humane housing, exhibition, handling, care, treatment, temperature, and transportation of animals by dealers, exhibitors research facilities, carriers, intermediate handlers, and operators of auction sales as set forth in part 3 of this subchapter.

State means a State of the United States, the District of Columbia, Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or any other territory or possession of the United States.

Study area means any building room, area, enclosure, or other containment outside of a core facility or centrally designated or managed area in which animals are housed for more than 12 hours.

Swim-with-the-dolphin (SWTD) program means any human-cetacean interactive program in which a member of the public enters the primary enclosure in which an SWTD designated cetacean is housed to interact with the animal. This interaction includes, but such inclusions are not limited to, wading, swimming, snorkeling, or scuba diving in the enclosure. This interaction excludes, but such exclusions are not limited to, feeding and petting pools, and the participation of any member(s) of the public audience as a minor segment of an educational presentation or performance of a show.

Transporting device means an interim vehicle or device, other than man, used to transport an animal between the primary conveyance and the terminal facility or in and around the terminal facility of a carrier or intermediate handler.

Transporting vehicle means any truck, car, trailer, airplane, ship, or railroad car used for transporting animals.

Weaned means that an animal has become accustomed to take solid food and has so done, without nursing, for a period of at least 5 days.

Wild animal means any animal which is now or historically has been found in the wild, or in the wild state, within the boundaries of the United States, its territories, or possessions. This term includes, but is not limited to, animals such as: Deer, skunk, opossum, raccoon, mink, armadillo, coyote, squirrel, fox, wolf.

Wild state means living in its original, natural condition; not domesticated.

Zoo means any park, building, cage, enclosure, or other structure or premise in which a live animal or animals are kept for public exhibition or viewing, regardless of compensation.

HISTORY: [54 FR 36119, Aug. 31, 1989, as amended at 55 FR 12631, April 5, 1990; 58 FR 39129, July 22, 1993; 62 FR 43272, 43275, Aug. 13, 1997; 63 FR 47128, 47148, Sept. 4, 1998; 63 FR 62925, 62926, Nov. 10, 1998; suspended at 64 FR 15918, 15920, Apr. 2, 1999; 65 FR 6312, 6314, Feb. 9, 2000; 68 FR 12283, 12285, Mar. 14, 2003]

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.
1:00CV01057(EGS)

DORIS DAY ANIMAL LEAGUE, *et al.*
Plaintiffs,

v.

DANIEL GLICKNAN, in his official capacity as Secretary,
United States Department of Agriculture, *et al.*
Defendants.

First Amended Complaint

Pursuant to Fed. R. Civ. P. 15(a), plaintiffs amend their complaint. Because defendants have not filed an answer, plaintiffs hereby amend their complaint in accordance with the rule.

/s/ Joseph Mendelson, III
JOSEPH MENDELSON, III
D.C. Bar No. 439949
Kimbrell & Mendelson
666 Pennsylvania Ave, SE
Suite 302
Washington, DC 20003
(202) 547-6485

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No.
1:00CV01057 (EGS)

DORIS DAY ANIMAL LEAGUE,
227 Massachusetts Ave., N.E.
Suite 100
Washington, DC 20002
MEDINA COUNTY SOCIETY FOR THE
PREVENTION OF CRUELTY TO ANIMALS
Box 135
Nedina, OH 44258
VALLEY RIVER HUMANE SOCIETY
7450 US 19
Marble, NC 28905
BOB BAKER
12430 Tesson Ferry Road
Box 127
Saint Louis, MO 63128
PUG HAVEN RESCUE FOUNDATION
23 South 16th Street
Kansas City, KS 66102
DON CURRY
485 Baseline Road
Kenton, TN 38233

Plaintiffs,

v.

DANIEL GLICKMAN, in his official
capacity as Secretary, United States
Department of Agriculture
Room 200-A, Admin. Bldg.
14th St & Independence Ave,S.W.
Washington, DC 20259

CRAIG REED, in his official
capacity as Administrator,
Animal Plant Health
And InspectionService
United States Department
of Agriculture
Room 312 East
14th & Independent Ave., S.W.
Washington, DC 20259

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action for declaratory judgement and injunctive relief challenging the defendants' implementation and administration of the Animal Welfare Act, 7 U.S.C. § 2131, *et seq.*

2. The Animal Welfare Act requires animal dealers to be licensed by the United States Department of Agriculture ("USDA") and meet minimum standards for record keeping and the humane handling, care, treatment, and transportation of dogs. *Id.* Inconsistent with the Animal Welfare Act, defendants excluded a number of animal dealers from the licensing, record keeping, and humane standards requirements by classifying these dealers under an exception for "retail pet stores." 9 C.F.R. § 1.1. Defendants actions in this regard are in violation of the Animal Welfare Act and the Administrative Procedure Act, 5 U.S.C. § 500-706.

3 The Animal Welfare Act also requires licensing, record keeping, and humane handling, care, treatment and transportation requirements for all hunting, security, and breeding dog dealers. Inconsistent with the Animal Welfare Act, defendants adopted a "policy" exempting retail hunting, security and breeding dog dealers from meeting these

regulations. 64 Fed. Reg. 38546 (1999). Defendants actions in this regard are in violation of the Animal Welfare Act and the Administrative Procedure Act. 5 U.S.C. § 500-706.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to the Animal Welfare Act, 7 U.S.C. § 2146(c), as well as 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as defendant), and 28 U.S.C. § 1361 (mandamus).

5. The relief requested is specifically authorized pursuant to 28 U.S.C. § 2201 (declaratory relief) and 28 U.S.C. § 2202 (injunctive relief) and the plaintiffs have a right to bring this action pursuant to 28 U.S.C. § 701-706 (Administrative Procedure Act).

6. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because the defendants in this action reside in this district and a substantial part of the events and omissions which gave rise to this action occurred in this district.

PARTIES

7.Plaintiff Doris Day Animal League ("DDAL") is located at 227 Massachusetts Avenue, N.E., Suite 100,. Washington, D.C. 20002. DDAL is a national non-profit corporation organized and existing under the laws of the State of California. DDAL membership totals more than 340,000. It has members in all fifty states. The interests of this plaintiff are being and will be adversely affected by the defendants' actions complained of herein.

8. Among DDAL's central organizational purposes is to protect and otherwise promote the welfare of non-human animals. DDAL is involved in a number of activities designed to reduce the pain and suffering of non-human animals, to encourage the spaying and neutering of .companion animals, and to increase the public's awareness of its responsibility toward non-human animals. DDAL's activities include

legislative initiatives, public and membership education, and programs to ensure the enforcement of existing statutes and regulations protecting animals.

9. DDAL's programs often involve initiating, and participating in, federal and state legal actions and administrative rulemaking proceedings concerning the humane care and use of all animals. DDAL and its members have a longstanding interest and concern for the care and welfare of animals protected under the Animal Welfare Act. DDAL opposes any. agency rule, policy, action, inaction, omission, and/or neglect which causes or permits physical pain, behavioral distress, suffering, debilitation and/or death to animals. Additionally, DDAL works to ensure that important governmental decisions affecting the lives and interests of animals are based on rational analysis and made according to law.

10. One of DDAL' s goals is to improve the living and breeding conditions for nonhuman animals, including hunting, security, breeding and other dogs, who are held out in the marketplace for sale as pets. DOAL achieves this goal by, *inter alia*, responding to its members' and the public's concerns about the inhumane and unhealthy condition of hunting, security, breeding and other dogs who they have observed or attempted to purchase.

11. DDAL also advises its members and members of the public seeking to purchase dogs as pets or for hunting, security, or breeding purposes about dealers who have been discovered to house and breed animals in a deplorable and inhumane manner and otherwise under conditions failing to meet the regulatory minimums established for all licensed animal dealers. Much of the information used by the DDAL in these efforts is derived from materials submitted by licensed animal dealers to the USDA as part of the Animal Welfare Act's animal dealer licensing requirements. These records include,' *inter alia*, annual reports submitted to the

USDA by licensees detailing compliance with the agency's regulations governing humane handling, care, and treatment of animals.

12. DDAL and its members have been in contact with the defendants since the 1985 formulation and establishment of the regulations governing all dog dealers. DDAL actively participated in the promulgation of the regulations created pursuant to the 1985 amendments to the Animal Welfare Act and in monitoring the enforcement of the Animal Welfare Act as it relates to Class "A" dealers. DDAL played a significant role in the development of Canadian regulations limiting the number of sick and diseased puppies entering Canada from U.S. Class "A" and Class "B" dealer operations.

13. Plaintiff DDAL has also submitted petitions for rulemaking to the defendants in an attempt to remedy the USDA's over broad interpretation of "retail pet store," and its failure to regulate hunting, security and breeding dog dealers as required by the Animal Welfare Act. DDAL has sent the defendant over 100,000 petitions and postcards from its members requesting the defendants to take prompt action to reduce the abuses prevalent in the puppy breeding industry by regulating retail dog dealers who sell dogs from their homes.

14. Since 1989, DDAL has approached the agency about its over broad application of the "retail pet store" exemption and the failure of the agency to apply its licensing requirements to hunting, security and breeding dogs dealers. By implementing and continuing to apply an over broad definition of "retail pet store," the defendants have arbitrarily and capriciously exempted numerous animal dealers from complying with the existing licensing, record keeping, and humane handling, care, and treatment regulations. As a result of USDA's actions, DDAL cannot obtain the necessary reporting and licensing information to advise its members, and members of the public, about dog dealers who comply with the Animal Welfare Act's provisions.

15. Similarly, defendants ongoing failure to require hunting, security and breeding dog dealers to meet .the, licensing, record keeping, and humane care standards as mandated by the Animal Welfare Act prohibits the DDAL from advising and reporting to its members and the public on specific hunting, security and. breeding dog dealers and whether they have bred and cared for their dogs in a manner consistent with the Animal Welfare Act and its governing regulations. DDAL is thus without the factual basis for furthering its organizational purpose and goal of initiating and implementing educational and other actions necessary to. improve the living condition of non-human animals and to provide its members and members of the public all relevant information about the current status of hunting, security, breeding and other dog dealers as it relates to the purchase of healthy companion animals.

16. Due to the defendants' failure to confine the "retail pet store" exemption to its recognized meaning and to regulate all hunting, security and breeding dog dealers, defendants have harmed, and continue to harm, DDAL's abilities to fulfill its organizational purpose and goal of providing information to its members and the public concerning the activities of dealers who sell dogs from their home as pets or for hunting, security, and breeding purposes. The plaintiff's injuries would be redressed by the relief requested of this Court because plaintiffs could receive the necessary information if these dealers had to comply with the licensing, record keeping, and humane handling, care, and treatment requirements of the Animal Welfare Act.

17. The DDAL also sues on behalf of its members. Members of the DDAL have a love and appreciation for animals. Plaintiff's interests have been adversely affected because on a regular ongoing basis members have observed and interacted with animals who have been severely abused and neglected by retail dealers.

18. Plaintiff members have repeatedly observed the filthy inhumane conditions of many retail dog dealers. Plaintiff members provide homes, food, and veterinary care for dogs seized from puppy mills. Because these dogs have been severely abused and neglected many suffer from a variety of physical conditions, including ringworm, skin ailments, and malnutrition. These animals also display extreme emotional problems. Many of these dogs exhibit either aggressive behavior or act severely fearful of humans. Plaintiff members attempt to rehabilitate dogs seized from puppy mills so that they can be adopted by families. Rehabilitating a dog that is suitable for adoption takes a lot of time and dedication. However, some of these dogs will never be suitable for adoption because they suffer severe emotional problems.

19. As a result of defendants' failure to require retail dealers, who sell dogs from their residence as pets or for hunting, breeding, or security purposes, from complying with any of the requirements of the Animal Welfare Act, plaintiff members expend significant time and money. Plaintiff members also have suffered and continue to suffer aesthetic injury from observing the condition of animals inhumanely treated by these retail dealers. Plaintiff's injuries would be redressed by the relief requested of this Court because by regulating these dealers, they would be required to comply with the minimum licensing, record keeping, and humane handling, care, and treatment requirements of the Animal Welfare Act, thus alleviating plaintiff's aesthetic harm and the need for plaintiff's members to provide rehabilitation, food, shelter, and veterinary care for these animals.

20. The Medina County Society for the Prevention of Cruelty to Animals ("SPCA") is located in Medina, Ohio. Plaintiff is a non-profit, tax exempt organization with over 900 members. The Medina County SPCA's organizational mission is to promote and educate the public about animal welfare and to enforce state animal cruelty laws. Plaintiff is a

county humane society as defined under section 17 of Ohio' s Revised Code. Plaintiff is permitted to appoint humane officers to investigate animal cruelty cases.

21. The Medina County SPCA investigates complaints against people who are suspected of inhumanely treating and caring for animals, including retail dealers of dogs who sell these animals from their homes as pets or for hunting, security, and breeding purposes.

22. The Medina County SPCA sues on its own organizational behalf. The Medina County SPCA sues because defendants exempt retail dealers of dogs, who sell these animals from their residences as pets or for hunting, security, or breeding purposes, from having to comply with any of the humane care and treatment requirements under the Animal Welfare Act. This illegal action by the defendants directly conflicts with, and injures, the organization's ongoing operations in promoting animal welfare by, *inter alia*, requiring the organization to expend significant resources to repeatedly investigate complaints of inhumane treatment by animal retail dealers. These investigations are necessary to counteract defendants' failure to require retail dealers who sell dogs from their residence as pets or for hunting, security, and breeding purposes from complying with any of the requirements under the Animal Welfare Act. The Medina County SPCA' s injuries would be redressed by the relief requested of this Court because by regulating these dealers, they would be mandated to meet the minimum licensing, record keeping, and humane handling, care, and treatment requirements under the Animal Welfare Act, thus alleviating the need for plaintiff to spend significant resources investigating complaints of inhumane treatment.

23. The Medina County SPCA also sues on behalf of its members,. Members of the Medina County SPCA have a love and appreciation for animals. Plaintiff's interests have been

adversely affected because on a regular ongoing basis plaintiff members have observed and interacted with animals who have been severely abused and neglected by retail dealers.

24. In response to complaints from breeders, members, and concerned citizens, plaintiff members investigate retail dealers and others suspected of inhumanely caring for an animal. During the investigation of retail dealers, plaintiff members have observed animals that have experienced severe abuse and neglect. Animals that are found to be abused or neglected are seized by the Medina County SPCA and provided with housing, food, rehabilitation, and veterinary care by plaintiff members.

25. Because these dogs have been severely abused and neglected, many suffer from a variety of physical conditions, including malnutrition, dehydration, and skin ailments. These animals also display extreme emotional problems. Many of these dogs exhibit either aggressive behavior or act severely fearful of humans. Plaintiff members attempt to rehabilitate dogs seized from puppy mills so that they can be adopted by families. Rehabilitating these animals requires significant time and expense from plaintiff members.

26. As a result of defendants' failure to require retail dealers, who sell dogs from their residence as pets or for hunting, breeding, or security purposes, from complying with any of the requirements of the Animal Welfare Act, plaintiff members expend significant time and money. Plaintiff members have alto suffered and continue to suffer aesthetic injury from observing the condition of animals inhumanely treated by these retail dealers. Plaintiff's injuries would be redressed by the relief requested of this Court because by regulating these dealers, they would be required to comply with the minimum licensing, record keeping, and humane handling, care, and treatment requirements of the Animal

Welfare Act, thus alleviating plaintiff's aesthetic harm and the need for plaintiff's members to provide rehabilitation, food, shelter, and veterinary care for these animals.

27. The Valley River Humane society is located at 7450 US 19, Marble, North Carolina 28905. Plaintiff is a nonprofit, tax exempt organization with over 350 members. The Valley River Humane society's organizational mission is to promote and educate the public about animal welfare.

28. Plaintiff also investigates complaints against people who are suspected of inhumanely treating and caring for animals, including retail dealers of dogs who sell these animals from their homes as pets or for hunting, security, or breeding purposes. Members have observed animals that have experienced severe abuse and neglect by retail dealers.

29. The Valley River Humane society sues on behalf of its members. Members of the Valley River Humane Society have a love and appreciation for animals. Plaintiff's interest have been adversely affected because on a regular ongoing basis plaintiff members have observed and interacted with animals who have been severely abused and neglected by retail dealers.

30. In response to regular complaints from members and concerned citizens, plaintiff and plaintiff members investigate retail dealers and others suspected of inhumanely caring for an animal. Dogs that are seized by the Valley River Humane Society are provided with housing, food, rehabilitation, and veterinary care. Because these dogs have been severely abused and neglected, many suffer from a variety of physical conditions, including malnutrition, dehydration, and skin ailments. These animals also display extreme emotional problems. Many of these dogs exhibit either aggressive behavior or act severely fearful of humans. Plaintiff members attempt to rehabilitate dogs seized from puppy mills so that they can be adopted by families. Rehabilitating a dog that is

suitable for adoption takes a lot of time and dedication. As a result of defendants' failure to regulate these dealers, plaintiff members have had to expend significant time and expense in order to rehabilitate these animals.

31. Furthermore, plaintiff, unfortunately, does not have space to seize all the dogs that are found to be abused or neglected. In order to monitor the conditions of dogs found to be abused and neglected, plaintiff members repeatedly visit retail dealers who maintain their dogs in inhumane conditions.

32. As a result of defendants' failure to require retail dealers, who sell dogs from their residence as pets or for hunting, breeding, and security purposes, from complying with any of the requirements of the Animal Welfare Act, plaintiff members expend significant time and money. Plaintiff members have also suffered and continue to suffer aesthetic injury from observing the condition of animals inhumanely treated by retail dealers. Plaintiff's injuries would be redressed by the relief requested of this court because by regulating these dealers, they would be required to comply with the minimum licensing, record keeping, and 'humane handling, care, and treatment requirements of the Animal Welfare Act, thus alleviating plaintiff's aesthetic harm and the need for plaintiff's members to provide rehabilitation, food, shelter, and veterinary care for these animals.

33. Bob Baker resides at 12430 Tesson Ferry Road, Box 127, saint Louis, Missouri 63128. The interests of this plaintiff are being and will be adversely affected by the defendants' actions complained of herein.

34. Plaintiff has a respect and appreciation for animals. Over the past twenty years, plaintiff has investigated numerous dog dealers throughout the country that are not regulated by USDA and documented his observations. Acting

upon complaints from consumers, local humane societies, and veterinarians, plaintiff has observed severe cases of abuse and neglect.

35. Plaintiff has worked to educate the public and Congressmen about the horrible conditions that dogs are subjected to at many of the. animal dealers around the country.

36. As a result of defendants' failure to require retail dealers, who sell dogs from their residence as pets or for hunting, breeding, or security purposes, from complying with any of the licensing, record keeping, and humane handling, care, and treatment requirements, plaintiff suffered and continues to suffer aesthetic injury from observing the condition of animals that are treated inhumanely. Plaintiff's injuries would be redressed by the relief requested of this Court because by regulating these dealers, the dealers would be required to comply with the minimum licensing, record keeping, and humane handling, care, and treatment requirements under the Animal Welfare Act, thus alleviating plaintiff's aesthetic harm.

37. Pug Haven Rescue Foundation is located at 23 South 16th Street, Kansas City, Kansas 66102. Plaintiff is a non-profit organization whose organizational mission is to rescue unwanted, abused, and neglected pugs. Many of the pugs rescued are from puppy mills. Plaintiff provides medical care, food, housing, attention, and finds homes for these animals.

38. Members of the Pug Haven Rescue Foundation receive newsletters and pictures of the new pugs rescued. The newsletters discuss the condition of the new pugs rescued and identifies the pugs recently adopted. Plaintiff also provides educational information on their website that discusses a broad range of information about puppy mills. This site even identifies the dealers where plaintiff members have observed dogs living in inhumane conditions so that other members will not purchase animals from these retailers.

39. Plaintiff sues on behalf of its members. Members of the Pug Haven Rescue Foundation have a love and appreciation for animals. Plaintiff's interests have been adversely affected because on a regular ongoing basis plaintiff members have observed and interacted with animals who have been severely abused and neglected by retail dealers.

40. Animals that are purchased by the Pug Haven Rescue Foundation from puppy mills are cared for and even adopted by many member plaintiffs. Because these dogs have been severely abused and neglected many suffer from a variety of physical conditions, including eye problems, skin ailments, and malnutrition. These animals also display extreme emotional problems such as being severely fearful of humans. Plaintiff members attempt to rehabilitate dogs seized from puppy mills so that they can be adopted by families. Rehabilitating these animals requires significant time and expense from plaintiff members.

41. As a result of defendants' failure to require retail dealers, who sell dogs from their residence as pets or for hunting, breeding, or security purposes, from complying with any of the licensing, record keeping, and humane handling, care, and treatment requirements, plaintiff's members expend significant time and money. Plaintiff members have also suffered and continue to suffer aesthetic injury from observing the condition of animals that are treated inhumanely. Plaintiff members' injuries would be redressed by the relief requested of this Court because by regulating these dealers, the dealers would be required to comply with the minimum licensing, record keeping, and humane handling, care, and treatment requirements under the Animal Welfare Act, thus alleviating plaintiff's aesthetic harm and the need for plaintiff's embers to provide rehabilitation, food, shelter, and veterinary care for these animals.

42. Don Curry resides at 485 Baseline Road, Kenton, Tennessee 38233. The interests of this plaintiff are being and will be adversely affected by the defendants' action complained of herein.

43. Plaintiff is a deputy in Gibson County, Tennessee. Plaintiff purchased a puppy in response to an advertisement in the newspaper. The breeder delivered the puppy to plaintiff. Shortly thereafter, plaintiff returned the puppy because it had severe stomach problems. Upon entering the breeder's home, plaintiff was overcome by the horrible smell of excrement. Plaintiff also heard numerous dogs barking behind the home but could not see the animals. Plaintiff accepted another puppy but as soon as plaintiff returned home, this puppy suffered severe stomach problems. After taking the puppy to a veterinarian, plaintiff discovered that the puppy's condition was due to the inhumane conditions that the puppy experienced at the puppy mill.

44. After learning that this breeder, who did not have a USDA license because they sold puppies from their residence, had sold puppies that were ill many times before, plaintiff requested a search warrant to search the breeder's residence. During this search, plaintiff observed puppies and dogs subjected to inhumane conditions, abuse, and neglect. All 400 dogs were seized by the local humane society.

45. Plaintiff has devoted significant time and expense to rehabilitating his puppy. It has been a year since plaintiff purchased his puppy yet he is still observing the dog's illnesses and providing medical treatment.

46. As a result of defendants' failure to require retail dealers, who sell dogs from their residence as pets or for hunting, breeding, or security purposes, from complying with any of the licensing, record keeping, and humane handling, care, and treatment requirements, plaintiff has expended significant time and money. Plaintiff has also suffered and

continues to suffer aesthetic injury from observing the condition of dogs inhumanely treated by retail dealers. Plaintiff's injuries would be redressed by the relief requested of this Court because by regulating these dealers, the dealers would be required to comply with the minimum licensing, record keeping, and humane handling, care, and treatment requirements under the Animal Welfare Act.

47. Defendant Daniel Glickman is sued in his official capacity as secretary of the United States Department of Agriculture, and in that capacity is charged with the duty to propose and promulgate regulations, prepare studies and reports, make determinations and findings, and take other actions implementing the Animal Welfare Act.

48. Defendant Craig Reed is sued in his official capacity as Administrator of the Animal Plant Health Inspection service ("APHIS") of the United States Department of Agriculture, and in that capacity is delegated the duty to propose and promulgate regulations, prepare studies and reports, make determinations and findings, and take other actions implementing the Animal Welfare Act.

STATEMENT OF FACTS

49. In 1966, Congress enacted the Federal Laboratory Animal Welfare Act to address the abuses that developed as a result of the Nation's vast program of medical research, particularly research involving experimentation with animals. P.L. No. 89-544, 80 Stat. 359 (1966).

50. In 1970, Congress passed the Animal Welfare Act of 1970 which expanded the coverage of the statute to include dealers of animals sold for use as pets. P.L. No. 91-579, 84 Stat. 1560 (1970). The 1970 amendments "established by law the humane ethic that animals should be accorded basic creature comforts of adequate housing, ample food and water, reasonable handling, decent sanitation, and sufficient ventilation." H.R. Rep. No. 1651, 91st Cong., 2d Sess. (1970)

reprinted in 1970 U.S.C.C.A.N. 5104. As a result of the amendments made in 1970, and subsequent amendments made in 1976 and 1985, the Act now requires the licensing of animal dealers and compliance with record keeping and humane handling, care, treatment and transportation regulations established by USDA.

51. Under the Animal Welfare Act "retail pet stores" are exempted from the Act's requirements. 7 U.S.C. § 2132. As a result, "retail pet stores" do not have to meet any of the licensing, record keeping, or humane handling, care, treatment and transportation regulations.

52. Defendants have defined "retail pet store" in their regulations as any *outlet* where dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchilla, domestic ferrets., domestic farm animals, birds, and cold blooded species, are sold or offered for sale, at retail, for use as pets. 9 C.F.R. § 1.1. Defendants extend this "retail pet store" exemption to anyone who sells retail, no matter if they are selling animals from a pet store or their own residence. 64 Fed. Reg. at 38546-7.

53. The defendants' regulatory interpretation of "retail pet store" is over broad and has allowed numerous animal dealers who sell from their residence to avoid meeting licensing, record keeping, or humane handling, care, treatment and transportation regulations. As a result, there are now hundreds of non-regulated retail animal dealers throughout the United states selling inhumanely handled, cared for, and treated animals from their residence. These animal dealers are commonly ref erred to as "puppy mills."

54. The Act also specifically states that all animal dealers selling dogs for hunting, security or breeding purposes cannot be exempted from the Act's licensing, record keeping, and humane handling, care, treatment and transportation regulations. 7 U.S.C. § 2132.

55. Defendants' own regulations require the regulation of all hunting, security, and breeding dog dealers. Contrary to these regulations, defendants' "policy" excluded all hunting, breeding, and security dogs from the Act's protections. Recently, defendants reviewed the Animal Welfare Act and their own regulations and decided to amend its. "policy" by including only wholesale dealers and excluding all retail dealers of hunting, breeding, and security dog dealers from the Animal Welfare Act's protections. 64 Fed. Reg. 38546.

56. On January 25, 1989, plaintiff DDAL wrote a letter to the USDA inquiring about the agency' s rationale for failing to regulate a specific breeder, and countless other "puppy mills" throughout the United States. Defendants responded in February of 1989, stating that the facility specifically complained of was not regulated because it was exempt from licensing based upon the defendants' interpretation of "retail pet store." Additionally, the defendants' letter stated that "Congress gave no clear indication as to their intent in regulating hunting, security and breeding dog dealers]." The defendants' letter continued that it was the defendants' "policy" not to regulate such facilities and that the agency was reviewing that "policy."

57. After waiting over five years for the defendants to finish the purported review of its hunting, security, and breeding dog "policy" and after submitting information about dog breeding abuses to the agency, on June 22, 1995, pursuant to the USDA regulations, 7 CF.R. § 1.28, and § 553 of the Administrative Procedure Act, plaintiff Doris Day Animal League filed a petition for. rulemaking ("Petition") with defendants notifying them that the agency's regulatory definition of "retail pet store" as any "outlet" was over broad and contrary to the intent of Congress and the Animal Welfare Act. Additionally, the Petition notified the defendants that its stated policy of exempting hunting, security, and breeding dog dealers from the protections in the agency's

regulations was contrary to the language and congressional intent of the Animal Welfare Act. The Petition asked the agency to take immediate action to remedy these violations of the Animal Welfare Act.

58. The Petition was served on Ms. Patricia Jensen, then acting Administrator of the Animal Plant Health Inspection Service (APHIS), by plaintiff organization Doris Day Animal League ("DDAL") Executive Director Ms. Holly Hazard on June 22, 1995.

59. Several months subsequent to having filed their petition with Ms. Jensen, plaintiff had still received no response to the Petition. On February 20, 1996, plaintiff sent a letter to APHIS employee Stephen smith indicating, *inter alia*, that the agency had still failed to acknowledge or respond to the Petition.

60. Plaintiff DDAL received no response from the February 20, 1996 letter and consequently, on April 22, 1996, plaintiff DDAL filed a "constructive denial" notifying the defendants of its intent to sue unless a response to the petition was forthcoming.

61. On December 19, 1996, after receiving no response to the April 22, 1996 letter, plaintiffs sued for unreasonable delay and for violations of defendants' statutory mandate under the Animal Welfare Act in this Court.

62. At a March 4, 1997, Initial Scheduling Conference, both parties presented to the Court that a settlement to the action had been reached. On March 14, 1997, the Court approved a stipulation of Dismissal establishing a schedule under which defendants would address the legal issues raised by plaintiffs through fact finding and rulemaking process.

63. On March 25, 1997, defendants published plaintiff DDAL's petition in the. Federal Register. 62 Fed. Reg 14044 (1997). A total of 36,000 comments were received by the agency.

64. By letter to plaintiff DDAL's counsel, defendants stated that the agency would issue a proposed rule addressing the issues raised in the petition by no later than April 27, 1998.

65. On April 4, 1997, plaintiff DDAL requested information under the Freedom of Information Act, 5 U.S.C. § 552, on all complaints made to the defendants on the conditions of hunting, security and breeding dog facilities and/or other animal facilities defined by the defendants as "retail pet stores." The documents disclosed to plaintiff DDAL on January 23, 1998, revealed that the defendants had received at least 837 complaints (385 in 1995, 199 in 1996 and 253 thru March 1997) of inhumane and abusive conditions at unregulated hunting, security, and breeding dog and other facilities exempted by defendants as "retail pet stores."

66. Defendants notified plaintiffs of their unilateral attempt to amend the Stipulation of Dismissal by issuing an advanced notice for proposed rulemaking (instead of a proposed rulemaking) at an undetermined time in the future.

67. In response to defendants' action, on April 27, 1998, plaintiffs filed a motion to enforce the Stipulation of Dismissal. The Court held a hearing in June 10, 1998 and asked both parties to explore an independent resolution of this matter. No resolution was reached.

68. On June 24, 1998, the Court held another hearing on plaintiffs' motion to enforce the Stipulation of Dismissal. At the hearing, defendants announced that they had published an Advanced Notice for Proposed Rulemaking ("ANPR") in the Federal Register. 63 Fed. Reg. 34,333 (1998).

69. The Court ordered the defendants to file a status report with the Court on or before December 17, 1998 and scheduled a status hearing on January 19, 1999. The Court also denied without prejudice plaintiffs motion to enforce the Stipulation of Dismissals.

70. Plaintiff DDAL submitted comments in response to the ANPR.

71. On December 14, 1998, defendants filed its status report and stated that due to the 11,000 comments received in response to the ANPR, the defendants could not make a determination on whether to proceed with a Notice of Proposed Rule by the January 19, 1999 status conference.

72. Plaintiffs filed a supplemental reply to defendants status report describing the results of an independent review of the comments. Plaintiffs found that there were only ten comments of significant substance. The remaining number of comments consisted of postcards and form letters.

73. Defendants remained noncommital at both the January 19, 1999, and the February 12, 1999, status hearing as to when the Secretary would determine whether to issue a notice for proposed rulemaking.

74. Due to defendants failure to act, plaintiffs filed a second motion to enforce the stipulation of Dismissal on March 12, 1999.

75. Finally, on July 19, 1999, defendants issued a decision and "policy" statement in the *Federal Register* in response to plaintiff DDAL's petition which requested: (1)narrowing the definition of "retail pet store" to include only nonresidential business establishments and (2) rescinding the "policy" excluding all hunting, breeding, and security dog dealers from complying with USDA's regulations. 64 Fed. Reg. 38546 (1999). Defendants decided not to narrow the definition of "retail pet store" and to modify its "policy" and regulations by requiring the regulation of only wholesale dealers of hunting, breeding, and security dogs.

76. Defendants have denied the majority of plaintiffs petition and therefore this action is ripe for judicial review.

CAUSE OF ACTION

A. *Count One*

USDA's Regulations Defining "Retail Pet Store" as any "outlet" is overly Broad, Arbitrary, Capricious, an Abuse of Discretion, and Violates the Clear Language and Meaning of the Animal* Welfare *Act.

77. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 76 *supra.*

78. The Animal Welfare Act requires .the secretary of Agriculture to issue licenses to animal dealers upon application and in a manner prescribed by the secretary. 7 U.S.C. § 2133. In order to obtain and maintain a license, animal dealers must meet, *inter alia*, minimum regulatory requirements for the humane handling, care, treatment and transportation of animals covered by the Act. Additionally, licensed dealers are subject to USDA inspection and record keeping requirements and can be mandated through administrative proceedings to correct behavior failing to meet the regulatory minimums.

79. Under the Animal Welfare Act, a "dealer" is defined as:

> [A]ny person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiate the purchase or sale of (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that the term does not include—
>
> > (i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

> (ii) any person who does not sell, or negotiate the purchase or sale of any wild animal dog, or cat, and who derives no more than, $500 gross income from the sale of other animals during any calendar year

Id. § 2132(f).

80. According to the definition of "dealer," any person who sells dogs or cats is a dealer. The only exception is for "retail pet stores" who sell these animals to consumers as pets.

81. Pursuant to the definition of "dealer" under the Animal Welfare Act, the defendants have defined "retail pet store" to include:

> any outlet where only the following animals are sold or offered for sale at retail, for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchilla, domestic ferrets, domestic farm animals, birds, and cold-blooded species.

9 C.F.R. § 1.1.

82. Defendants have interpreted the term "retail pet store" to include *any outlet* where a person sells animals retail, including the selling of animals from a residence. *See* 64 Fed. Reg. at 38546-7. Consequently, all retail pet dealers regardless of whether the dealer is selling the animal from a store are exempt from complying with any of the requirements under the Animal Welfare Act.

83. As aresult of defendants' actions in implementing this over broad regulatory definition of "retail pet store," defendants have exempted hundreds of dog and cat breeders from the regulatory requirements of licensing, record keeping and humane care, handling and transportation requirements in amanner contrary to the scope and Congressional intent of the Animal Welfare Act.

84. In light of the foregoing, defendants' overly broad regulation defining "retail pet store" is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 702 and 706.

B. *Count Two*

USDA's "Policy" Excluding All Retail Dealers of "Hunting, Breeding and Security Dogs" From the Provisions of the Animal Welfare Act is Arbitrary, Capricious, an Abuse of Discretion and a Direct Contravention of the Explicit Language of the Statute.

85. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 84 *supra.*

86. The Animal Welfare Act requires the secretary of Agriculture to issue licenses to animal dealers upon application and in manner prescribed by the Secretary. 7 U.S.C. § 2133. In order to obtain and maintain a license, animal dealers must meet, *inter alia*, minimum regulatory requirements for the humane handling, care, treatment and transportation of animals covered by the Act. *Id.* Additionally, licensed dealers are subject to USDA inspection and record keeping requirements and can be mandated through administrative proceedings to correct behavior failing to meet the regulatory minimums.

87. Under the Animal Welfare Act, a "dealer" is defined as:

> [A]ny person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiate the purchase or sale of (1) any dog or other animal whether alive or dead for

research, teaching, exhibition, or use as a pet, or (2) *any dog for hunting security, or breeding purposes* except that the term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year

Id. § 2132(f) (emphasis added)

88. Pursuant to the definition of dealer contained in the Animal Welfare Act, *all* hunting, breeding, and security dog dealers must *inter alia*, obtain a license and meet minimum regulatory requirements for record keeping and the humane handling, care, treatment and transportation of animals covered by the Act. 7 U.S.C. § 2133, 2140, 2143.

89. Recently, defendants published a "policy" statement in the Federal Register improperly interpreting the Animal Welfare Act. USDA stated that it will not require hunting, security and breeding dog retail dealers to obtain licenses or meet the minimum record keeping and humane handling care and transportation standards established under the Animal Welfare Act. 64 Fed. Reg. at 38547-8.

90. In light of the foregoing, defendants' failure to regulate retail dealers who, *inter alia*, sell animals for hunting, security, or breeding purposes is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 702 and 706.

RELIEF REQUESTED

WHEREFORE, plaintiffs respectfully request that this Court enter an Order:

(1) Declaring that:

(a) Defendants' over broad regulatory definition and interpretation of "retail pet store" found at 9 C.F.R. § 1.1 (1996) is arbitrary and capricious, an abuse of discretion, and not in accordance with law;

(b) Defendants' "policy" interpreting the Animal Welfare Act to exclude hunting, security, and breeding retail dog dealers from all licensing, record keeping, and humane handling, care, treatment and transportation regulations is arbitrary and capricious, an abuse of discretion and not in accordance with law.

(2) Direct the defendants to:

(a) Immediately undertake rulemaking procedures to narrow the definition of "retail pet store" in a manner consistent with its common use;

(b) Immediately rescind their "policy" of exempting hunting, security, and breeding retail dog dealers from licensing, record keeping and humane handling, care, treatment and transportation regulations.

(3) Rescind all licensing regulations that are inconsistent with these regulatory changes.

(4) Retain jurisdiction of this action to ensure compliance with its decree;

(5) Award plaintiffs attorney's fees and all other reasonable expenses occurred in pursuit of this action; and

(6) Grant such other relief as the Court deems just and proper.

Respectfully submitted,

/s/ Joseph Mendelson, III
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D.C. Bar No.439949
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DATED: July 6, 2000

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a copy of Plaintiffs' First Amended Complaint, and all materials in support thereof, was sent by first class mail this 6th day of July 2000 to:

Honorable Janet Reno
Attorney General of the United States
Department of Justice
950 Pennsylvania Ave., N.W.
Room 4400
Washington, DC 20530-0001

Wilma Lewis
United States Attorney's Office
555 4th Street, N.W.
10th Floor, Civil Division
Washington, DC 20001

Hon. Daniel Glickman, Secretary
United States Department of Agriculture
Room 200-A, Admin. Bldg.
14th St. & Independence Ave., S.W.
Washington, DC 20259

Craig Reed, Administrator
Animal Plant Health And Inspection Service
United States Department of Agriculture
Room 312 East
14th & Independence Ave., S.W.
Washington, DC 20259

/s/ Joseph Mendelson, III
JOSEPH MENDELSON, III

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.
1:00-cv-01057 (CKK)

DORIS DAY ANIMAL LEAGUE, *et al.*,
Plaintiffs,

v.

ANN VENEMAN,
Secretary of Agriculture, *et al.*,
Defendants.

DECLARATION OF
KATHY WILKES-MYERS

I, Kathy Wilkes-Myers, state:

1. I reside at 4592 Only Rd, Only Tennessee 37144. All information herein is based upon my personal knowledge.

2. I am a member of the Doris Day Animal League and the founder of the Love Me Tender Animal Refuge. I have a love and appreciation for animals. I have always helped animals throughout my life. In order to understand the physical needs of animals, I worked for a local veterinarian. In 1987, I started my own nonprofit in order to care for and rehabilitate animals that have been abused or neglected. There are a large number of breeders that are inhumanely caring for their animals so I decided to make a life change by dedicating my time to helping these animals. I also helped start the Hickman Humane Society in 1996. I previously served as Vice President but I recently left my role with this organization.

3. On December 17,1998, the President of the Hickman Humane Society and I responded to a complaint of animal cruelty. Tennessee state law permits societies for the prevention of cruelty to animals the power to interfere to prevent an act of animal cruelty.

4. The breeder that we were going to investigate lived on a seventeen acre farm in rural Tennessee. To get to the breeder's house we had to turn off of the main road onto a dirt road. Part way down this dirt road, a creek intercepted the road. Luckily, we had our four wheel drive vehicle to go through the creek to reach the other side of the dirt road. It was over two miles from the main road to the breeder's house.

5. When we were going up her driveway, the first thing we saw were several Siberian Husky's chained to trees. Some of the dogs could not get out of the rain and mud because their chains would not allow them to their make-shift shelters. There were two female dogs that were nursing puppies. Some of the puppies were on the cold ground in the mud and others were hiding under a rotten old pile of lumber. All of the dogs were filthy end they did not have any food or water.

6. To the front of the house there were three more large dogs that were tied up and they had shelters that were rotten and caving in with no food or water. A poodle mix was huddled up with one of the large dogs trying to stay warm. It was one o'clock and the temperature was only 42 degrees with no sun and the wind was blowing.

7. We parked in front of the house and saw approximately 9 cages on the front porch with a ragged old sheets tied around them as if to conceal them. These cages had three to four dogs in each. These cages were caked with feces, newspaper, and urine.

8. As we got out of the car and went to her side door, we saw a dead Yorkshire terrier puppy on the ground with the trash. It looked like it had been there for several days.

9. At the side of her house there was a boat with cages around it. The cages had wire tops with no overhead shelter. The cages were filled with puppies that looked no older than 6 weeks old. There were also about twenty dog carriers with each containing a mother dog and her newborn pups .All of these dogs were living off of their own excrement. They had no food or water.

10. To the back of her house, there were two long fifty foot rows with two foot by three foot rabbit hutch type cages. Each cage had five to six dogs in it. The cages were dilapidated and rotten and the wire was rusted and jagged. None of the cages prevented the dogs from being exposed to weather such as sun, rain, snow, and wind. The cages were designed so the feces and urine would fall throw the bottom. Under many of the cages there was a mountain of feces that had formed. Underneath each hutch, I saw maggots, tape-worms, and roundworms. We walked through a river of urine and feces that flowed from each hutch.

11. The cages had rusted coffee cans in them and the water was frozen solid. The can was too big for the small dogs. The little dogs could not reach the water and had scrapes on their neck from trying to get the water. There was no food and they were living off of their own feces.

12. All of the dogs showed signs of neglect. The dogs had very little room to move and they looked like prisoners of war. It was obvious from observing these dogs that they were starving. There were also signs of cage anxiety. This is when an animal is confined in too small of an area with extreme overcrowding.

13. As we walked around the property, we saw twenty to thirty small dogs called a Skipkee that were running around in

packs. They were eating a dead horse that was in the field. Along with the starving dogs, she had several horses that were starving.

14. Then, we saw an old dilapidated eight foot by twenty-five foot long trailer. When we opened the doorto the trailer, the smell of ammonia literally took our breath away and burned our eyes. We could not believe what we saw, small dogs were living in almost total darkness and there was no sound coming from them. It was as if they were trying to disappear out of fear.

15. Two to three cages were stacked on top of each other. The urine and feces from the dogs above fell to the dogs below. Some dogs were locked in travel carriers and living on top of what appeared to be years of waste. The floor of the trailer was at least eight inches deep in newspaper, feces, and urine. None of the dogs had water. There was no ventilation and it was freezing cold.

16. All the dogs showed extreme signs of neglect, malnourishment and dehydration. The dogs had urine scald or feces bum and mange, lice, hookworms, and eye discharges from infections. What I had observed was hell on earth.

17. As we were going around the property observing the conditions of the animals, the breeder's son tried to run us over with a tractor and the husband chased us around with a shot gun. Even after this attempt to intimidate us, we continued our investigation the next day.

18. The next day we discovered more dogs. We went up on a hill and saw puppies that were dead. It looked like a coyote had eaten them. There were other dead dog carcase lying around. The skin and fur from the dogs was all that was left. I did not think it could possible get any worse but then it did.

19. We found large dogs including golden retrievers, cocker spaniels, Afghan hounds and Samoyeds up on the hill. These dogs were living on the ground in several inches of mud. Their hair was matted and the only water the dogs had was rain water and it was full of leaves. The conditions were so bad that we found one husky that had climbed a tree.

20. When we approached the dogs, some were excited and were barking and others were scared and tried to run away from us. It was as if the scared dogs had witnessed horrible abuse. We also found a dog that had been shot and had received no medical care. It had a temperature of 107 degrees.

21. Observing the dogs in these deplorable conditions upset me so deeply that I cried. Words cannot adequately express what I saw and what I felt. I could not believe that any person was capable of being so cruel.

22. A local United States Department of Agriculture ("USDA") official visited the breeder's property to view the conditions of the horses but did not even look at the conditions of the dogs. Because individual retail breeders are not regulated by USDA, the agency did nothing to penalize this breeder. Instead, the breeder was charged by the state for animal cruelty.

23. We seized 253 dogs from the breeder. We did not have space to house all of these dogs so we needed people to provide temporary foster care. If the breeder was found not guilty of animal cruelty charges, then the animals would be returned to her. If the breeder was found guilty, then the dogs could remain permanently with the family. I wanted people to see for themselves, the conditions that these dogs were living in so we had people interested in providing foster care come to the breeder's house. We received a large amount of press coverage which helped us quickly find homes for the dogs.

24. It was so difficult for me to keep returning to the breeder's house. I just could not bare seeing the dogs in these

terrible conditions but I made myself do it because the dogs needed my help. After spending time at this breeder's property with the dogs, I would come home completely filthy. I was afraid of spreading parvo or any other disease to my own animals and infecting my family so I would bleach my clothes and even take a bleach bath.

25. I was so upset over what I had observed at this breeder's property that I believe that I suffered from post traumatic syndrome disorder. I experienced chills, shakes, and nightmares. I just could not shake the horrible sights of abuse and neglect that I observed. I was so upset with this breeder. I wanted her to experience the misery that she subjected these dogs to.

26. I currently have 23 dogs from this puppy mill at my refuge. Not all of the dogs from this breeder were able to be adopted. Some of the dogs suffered such severe abuse and neglect that they will not make good pets. For example, some of the dogs shutter and shake, bite people out of fear, and defecate on themselves. Some of the dogs that were repeatedly bred have never walked on the ground. They have been in a cage their whole life so they have terrible arthritis. In addition, some people who were providing foster care for a dog returned it to me because they did not have the patience to care for all of its needs. I am trying to rehabilitate these dogs so that they can learn to trust humans and maybe one day they will be able to be adopted by a loving family.

27. Taking care of animals that have been abused and neglected by individual retail breeders is an ongoing expense. I have spent a large amount of time and expense caring for these animals. I provide food, water, shelter, medical care and lots of attention.

28. Although the breeder we investigated was ordered by the state court not to keep animals that ordinarily go in cages for five years and to give the Hick man Humane Society

permission to inspect her property at will, she has already violated this order. The breeder continuously refused to allow the humane society on her property. However, recently the humane society did discover that she had 164 caged animals living in deplorable conditions. Again, these dogs were seized and I helped find the puppy mill dogs new homes.

29. There are numerous puppy mills in thus area that are not regulated by USDA. There are many backyard operations who sell dogs retail. These are not people who have one or two litters a year and are not in it for the money but rather, these are people who have twenty to thirty dogs that they breed for sale. These breeders are motivated completely by profit. The inhumane conditions of puppy mills is an ongoing problem. I am still observing dogs that have been subjected to puppy mills and helping to rehabilitate them.

30. I am frustrated and upset over repeatedly observing dogs that have been inhumanely treated by large individual retail breeders not regulated by USDA. Due to USDA's illegal exclusion of all retail dealers, these breeders have no legal duty to adequately care for these animals and as a result, many dogs receive inhumane care and treatment by retail dealers. If USDA required individual retail dealers to comply with the Animal Welfare Act, they would be required by law to provide their dogs with adequate food, water, shelter, and veterinary care. Due to the continuous and ongoing abuse and neglect inflicted by many individual retail dealers, I have had to observe dogs suffering from abuse and neglect and expend a significant amount of time and money to rehabilitate and care for rescued dogs.

31. I want to observe and enjoy my contact with dogs, however, I am personally, aesthetically, emotionally, and profoundly disturbed when observing dogs treated and cared for inhumanely. Repeatedly, I have observed dogs that were subject to deplorable living conditions, which has been an assault on my senses. I am concerned about the welfare of

these animals because USDA does not require individual retail dealers who sell dogs from their own residence or any individual retail dealers of hunting, security, or breeding dogs to comply with the humane standards required under the Animal Welfare Act. Although I have tried to alleviate the suffering for some of the dogs, I can only do so much. There are dogs subjected to deplorable living conditions throughout the country and unfortunately, I cannot inspect and ensure that all dogs intended as pets or for hunting, security, or breeding purposes are provided with humane care or rehabilitate all the dogs treated inhumanely by individual retail dealers.

32. In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 03-05-2001

/s/ Kathy Wilkes-Myers
KATHY WILKES-MYERS

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.
1 :00-cv-01057 (CKK)

DORIS DAY ANIMAL LEAGUE, *et al.*,
Plaintiffs,

v.

ANN VENEMAN, Secretary of Agriculture, *et al.*,
Defendants.

DECLARATION OF DON CURRY

I, Don Curry, state:

1. I reside at 485 Baseline Rd, Kenton, Tennessee 38233. All information herein is based upon my own personal knowledge.

2. I am a deputy sheriff in Gibson County, Tennessee. In June 2000, I saw an advertisement in the newspaper listing dogs for sale. I called and the breeder met me at the Sheriffs department to deliver a Pekingese puppy. I purchased the dog for $275 expecting a healthy puppy dog but I did not even make it home before the dog got sick. I took the dog to the veterinarian who said that the dog has intestinal problems from living in filthy conditions. This puppy was almost blind due to a scratched eye.

3. Shortly thereafter, I returned the puppy because I wanted a healthy dog. Upon entering the breeder's home, I was overcome by the horrible smell of excrement. I also heard numerous dogs barking behind the home but I could not see these animals. The first dog she showed me had mange. I did not accept this dog. I did accepted another puppy, a

Scottish terrier. I was hoping this dog would be healthy but as soon as I got home, this puppy also suffered severe stomach problems. In addition to throwing up, this puppy had open soars on its body. I took this puppy to the veterinarian right away and was told that this puppy's poor health was also due to the inhumane living conditions that the puppy experienced while with this breeder. I then requested a search warrant to search the breeder's residence.

4. When we started to search the home, I could not believe what I saw. I had never observed ' like this in mylife. The dogs were ate up with fleas and some had sores, hairloss, eye infections, and mange. There were even poodles matted together like Siamese twins. It was upsetting that a human could do this to poor animals.

5. Some dogs were in the house and others were in a mobile home where the insides had been removed and it was lined with cages. Cages were stacked three deep in the mobile home. The dogs on the top row defecated on those on the bottom row. The dogs had walked on the excrement in the cages turning it into powder that was three to four inches deep.

6. The dog's food had fallen to the bottom of the cages and they were eating it along with the feces. Their water buckets were green with mucky water. There were even maggots in the cages.

7. There were about 400 dogs living in terrible filthy conditions and they were seized by the local humane society. In the barn there were about ten dead dogs. It was so sad to see these animals living in these conditions.

8. There were receipts in the house showing that people had paid anywhere from $200-$800 for a dog. All that people want when they purchase a puppy is a healthy dog and instead what I and others got were sick sad little dogs.

9. The breeder that I purchased my dog from along with her husband were charged with animal cruelty. They were both sentenced to six months in prison and fined twenty-one thousand dollars. This same breeder was fined and placed on six months probation in 1993. Because this breeder has repeatedly raised animal in deplorable conditions, I fear that she may do it again. To ensure that this breeder does not attempt to create another puppy mill, I drive by her house and observe the conditions.

10. The dog that I purchased from this breeder was constantly ill. The dog suffered from a terrible skin disease that the veterinarian could not cure. The dog just kept losing hair. Sadly, my dog recently died.

11. I am frustrated and upset over this breeder's inhumane treatment of dogs. The United States Department of Agriculture ("USDA") was never involved in any part of the animal cruelty charges against this breeder. This breeder is not licensed by USDA because she is a individual retail dealer who breeds dogs and sells puppies from her own residence and thus she has no legal duty under USDA's regulations to adequately care for these animals. As a result of the inhumane treatment from this breeder, I had to watch my puppy suffer from an illness and spend a significant amount of time and money to rehabilitate my puppy. Unfortunately, none of the medical treatment helped my puppy survive its illness.

12. I want to observe healthy dogs and enjoy the companionship of a healthy dog. I am personally, aesthetically, and emotionally disturbed from observing dogs that are suffering from being inhumanely treated by retail dealers. Because USDA does not require individual retail dealers who breed and sell dogs from their own premises to comply with any of the Animal Welfare Act requirements for humane handling and care, I am concerned about purchasing another dog. I do not want to go through the heartache of observing

the suffering of another sick puppy. However, before I purchase another dog, I will insist on observing the living conditions of all the dogs and their puppies.

13. In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 6, 2001

/s/ Don Curry
DON CURRY

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.
1:00-cv-01057 (CKK)

DORIS DAY ANIMAL LEAGUE, *et al.*,
Plaintiffs,

v.

ANN VENEMAN, Secretary of Agriculture, *et al.*,
Defendants.

DECLARATION OF HOLLY HAZARD

I, Holly Hazard, state:

1. The Doris Day Animal League ("DDAL") is located at 227 Massachusetts Avenue, N.E., Suite 100, Washington, D.C. 20002. I am the Executive Director of DDAL. All information herein is based on my own personal knowledge.

2. DDAL is a national non-profit corporation organized and existing under the laws of the State of California. DDAL membership and constituents total more than 340,000. It has members in all fifty states.

3. Among DDAL's organizational purposes is to promote the humane care and treatment of nonhuman animals. DDAL is involved in a number of activities designed to reduce the pain and suffering of non-human animals, to encourage the spaying and neutering of companion animals, and to increase the public's awareness of its responsibility toward non-human animals. DDAL's activities include legislative initiatives,

public and membership education, and programs to ensure the enforcement of existing statutes and regulations protecting animals.

4. DDAL and its members have a longstanding interest and concern for the care and welfare of animals protected under the Animal Welfare Act. DDAL opposes any agency rule, policy, action, inaction, omission, and/or neglect which causes or permits cruelty, physical pain, behavioral distress, suffering, debilitation and/or death to animals. DDAL and its members have been in contact with the defendants since the 1985 formulation and establishment of the regulations governing all dog dealers. DDAL actively participated in the promulgation of the regulations created pursuant to the 1985 amendments to the Animal Welfare Act and in monitoring the enforcement of the Animal Welfare Act as it relates to Class "A" dealers. DDAL played a significant role in the development of Canadian regulations limiting the number of sick and diseased puppies entering Canada from U.S. Class "A" and Class "B" dealer operations.

5. One of DDAL's primary functions is to disseminate information about animal welfare, including the care and treatment provided by individual retail dog breeders, to its members and other interested people. DDAL seeks to improve the living and breeding conditions for nonhuman animals, including hunting, security, breeding and other dogs, who are held out in the marketplace for sale as pets.

6. DDAL achieves this goal by, *inter alia*, responding to its members' and the public's concerns about the inhumane and unhealthy condition of hunting, security, breeding and other dogs sold as pets who they have observed or attempted to purchase. DDAL also advises its members and members of the public seeking to purchase dogs as pets or for hunting, security, or breeding purposes about dealers who have been discovered to house and breed animals in a deplorable and

inhumane manner and otherwise under conditions failing to meet the regulatory minimums established for all licensed animal dealers.

7. DDAL derives information on animal breeders from materials submitted by licensed animal dealers to the USDA as part of the Animal Welfare Act's animal dealer licensing requirements. These records include, *inter alia*, annual reports submitted to the USDA by licensees detailing compliance with the agency's regulations governing humane handling, care, and treatment of animals.

8. The United States Department of Agriculture's ("USDA") failure to regulate individuals who sell dogs retail from their own premises and individual retail breeders of hunting, security, and breeding dogs injures DDAL's organizational activities. Because individual retailers are not required to obtain a license and demonstrate that they are complying with the humane handling and treatment requirements, DDAL is unable to obtain information on breeders. Without information on breeders who comply and who do not comply with the Animal Welfare Act, DDAL is prevented from advising its members and others on breeders who provide humane care and treatment.

9. DDAL has submitted petitions for rulemaking to the defendants in an attempt to remedy the USDA's over broad interpretation of "retail pet store," and its failure to regulate hunting, security and breeding dog dealers as required by the Animal Welfare Act. DDAL has sent the defendant over 100,000 petitions and postcards from its members requesting the defendants to take prompt action to reduce the abuses prevalent in the puppy breeding industry by regulating individual retail dog dealers who sell dogs from their homes.

10. Since 1989, DDAL has approached the agency about its overbroad application of the "retail pet store" exemption and the failure of the agency to apply its licensing require-

ments to hunting, security and breeding dogs dealers. By implementing and continuing to apply an over broad definition of "retail pet store," the defendants have arbitrarily and capriciously exempted numerous animal dealers from complying with the existing licensing, record keeping, and humane handling, care, and treatment regulations. As a result of USDA's actions, DDAL cannot obtain the necessary reporting and licensing information to advise its members and members of the public, about dog dealers who comply with the Animal Welfare Act's provisions.

11. Similarly, defendants ongoing failure to require hunting, security and breeding dog dealers to meet the licensing, record keeping, and humane care standards as mandated by the Animal Welfare Act prohibits the DDAL from advising and reporting to its members and the public on specific hunting, security and breeding dog dealers and whether they have bred and cared for their dogs in a manner consistent with the Animal Welfare Act and its governing regulations.

12. DDAL has investigated the conditions of dogs and the premises of dog breeders. In many instances, DDAL has found these conditions inconsistent with the minimum standards required under the AWA. However, because of USDA's exclusion of all individual retail dealers from the requirements of the AWA, DDAL's mission to protect these animal from harm is frustrated.

13. As a result of defendants' regulations excluding all retail dealers, DDAL is without the factual basis for furthering its organizational purpose and goal of improve the living condition of non-human animals by disseminating information to its members and members of the public about the current status of hunting, security, breeding and other dog dealers as it relates to the purchase of healthy companion animals.

14. Due to the defendants' failure to confine the "retail pet store" exemption to its recognized meaning and to regulate all hunting, security and breeding dog dealers, defendants have harmed, and continue to harm, DDAL's abilities to fulfill its organizational purpose and goal of providing information to its members and the public concerning the activities of dealers who sell dogs from their home as pets or for hunting, security, and breeding purposes.

15. In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 6, 2001.

/s/ Holly Hazard
HOLLY HAZARD

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.
1:00-cv-01057 (CKK)

DORIS DAY ANIMAL LEAGUE, *et al.*,
Plaintiffs,

v.

ANN VENEMAN, Secretary of Agriculture, *et al.*,
Defendants.

DECLARATION OF JEFF HOLLAND

I, J. Jeffrey Holland, state:

1. The Medina County Society for the Prevention of Cruelty to Animals ("SPCA") is a county humane society organized pursuant to Chapter 1717 of the Ohio Revised Code, and is located in Medina County, Ohio (P.O. Box 135, Medina, Ohio 44258). I am a member of the Medina County SPCA. I am also an attorney, appointed pursuant to Ohio law to prosecute animal cruelty cases for several county humane societies. All information herein is based upon my own personal knowledge.

2. The Medina County SPCA's organizational mission is to promote animal welfare in Medina County. To ensure that animals are receiving humane care and treatment, the SPCA appoints humane officers who are appointed as law enforcement officials by our county probate court. These humane officers are empowered to investigate complaints of animal cruelty, to make arrests for violations of animal cruelty laws, and to prosecute offenders. Animals found by the humane officer to be living in inhumane conditions may be seized as

evidence, and are then held pending resolution of the criminal complaint. Because it does not have a shelter facility of its own, the SPCA relies on members to provide "foster care" for animals pending trial. I have personally housed and cared for at least a dozen dogs that were seized from an animal dealer pursuant to an animal cruelty prosecution, some of which were maintained at my residence for as long as 9 months.

3. From my own personal observations, as well as my review of veterinarian and investigatory records, it is clear that the dogs that I cared for were suffering from severe neglect, which manifested itself by evidence of filth, hair loss, malnutrition, and skin ailments. Many of these dogs also displayed behavioral problems. Many of the dogs seized from this animal dealer exhibited either aggressive behavior, fear of humans, or other evidence of poor socialization. My wife and I devoted a significant amount of time and expense to rehabilitating these animals.

4. The SPCA's investigation of animal dealers suspected of animal cruelty is ongoing. One individual retail dealer in particular was charged with multiple counts of animal cruelty in 1991 for pervasive conditions of cruelty and neglect which were widely prevalent among the over 100 animals kept at her residence. Pursuant to a negotiated plea agreement, this defendant plead no contest to and was found guilty of criminal mischief, and was placed on probation, which included periodic inspection of the condition of her animals. At that time, the Medina County SPCA incurred more than forty thousand dollars for the care and rehabilitation of the animals seized from this retail dealer. In 1999, the same defendant was charged with and found guilty of 25 counts of animal cruelty covering 75 of the 130 animals kept at her property, under conditions very similar to those observed in 1991. The defendant was ordered to forfeit seized animals, was sentenced to 60 days in jail, and was ordered to serve the maximum term of probation of 5 years, which will again

include periodic inspections. The SPCA incurred significant, additional cost due to the 1999 seizure. This case remains on appeal.

5. Because individual dealers are excluded from USDA regulations, and therefore no regulating agency conducts inspections or otherwise requires compliance with the Animal Welfare Act, the SPCA will continue to expend significant time and resources to ensure that individual retailers are providing humane care for their animals by investigating and enforcing Ohio animal cruelty laws. If USDA enforced regulations for the humane treatment of animals, and confirmed compliance through inspections, the costs expended by the Medina County SPCA would be significantly reduced. Inspections of retail premises would be a useful tool for discovering illegal acts of animal cruelty which otherwise go undetected until information is gathered sufficient to support a search warrant.

6. I am personally, aesthetically, emotionally, and profoundly disturbed when observing dogs that have been treated and cared for inhumanely. Repeatedly, I have observed dogs that were subject to deplorable living conditions, which has been an assault on my senses. I am concerned about the welfare of these animals because USDA does not require individual retail dealers who sell dogs from their own residence to comply with humane standards required under the Animal Welfare Act. Although I have tried to alleviate the suffering for some dogs, the Medina County SPCA can only do so much.

7. In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 6, 2001.

/s/ Jeff Holland
JEFF HOLLAND

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.
1:00-cv-01057 (CKK)

DORIS DAY ANIMAL LEAGUE, *et al.*,
Plaintiffs,

v.

ANN VENEMAN, Secretary of Agriculture, *et al.*,
Defendants.

DECLARATION OF BOB BAKER

I, Bob Baker, state:

1. I reside at 12430 Tesson Ferry Road, Box 127, Saint Louis, MO 63128. All information herein is based upon my personal knowledge.

2. Over the past twenty years, I have investigated dog dealers throughout the country and documented my observations. Acting upon complaints from consumers, local humane societies, and veterinarians, I have observed severe cases of abuse and neglect.

3. I have visited approximately 600 to 700 animal dealers and observed how these animals were being cared for and treated. I have repeatedly observed dealers caring for animals in deplorable conditions. Some of the conditions that I have documented include: lack of veterinary care, lack of socialization, lack of nutrition, and lack of disease control. Animals are repeatedly housed in overcrowded cages that provide insufficient shelter from the elements. Lack of food and water is a very large problem. Frequently, nursing

mothers will be dehydrated and lack proper nutrition and consequently, the puppies will also be deprived of sufficient nutrition.

4. In order to stop these terrible cases of abuse and neglect by dealers, I have worked to educate the public and legislatures about the horrible conditions that many dogs are subjected to at many animal dealers across the country. I have testified to Congress about the horrible conditions in puppy mills and in Missouri and Kansas, I helped establish a state law similar to the Animal Welfare Act that requires the licensing of all dealers. Unfortunately, the state inspectors are failing to prevent the animal cruelty.

5. From any experience, self regulation does not guarantee a humane ethic or replace the goals of the Animal Welfare Act, even when the dealer is affiliated with a dog organization. In particular, with the American Kennel Club, their main function is not to report inhumane conditions, but rather to guarantee the parentage of the animal. A big source of their income involves the registering of dogs.

6. I have visited and observed the conditions at wholesale dealers and retail dealers. The conditions at many of the retail dealers who raise and breed animals on their own premises are just as deplorable as the conditions at wholesale dealers. From my experience, it is completely erroneous to suggest that individual retail dealers are not part of the puppy mill problem. Furthermore, investigating unlicensed retail dealers who breed and sell animals from their own property can be difficult because these dealers are not open to the public and therefore are not easily accessible.

7. I am upset and frustrated that individual retail dealers, who are not required to be licensed by the United States Department of Agriculture ("USDA"), are permitted to raise animals in deplorable conditions. Due to USDA's illegal exclusion of all retail dealers, these breeders have no legal

duty to adequately care for these animals and as a result, many dogs receive inhumane care and treatment by individual retail dealers. If USDA required individual retail dealers to comply with the Animal Welfare Act, they would be required by law to provide their dogs with adequate food, water, shelter, and veterinary care. Due to the continuous and ongoing abuse and neglect inflicted by many retail dealers, I have had to observe dogs subjected to inhumane care and treatment. Furthermore, I have devoted a large amount of time to investigate animal dealers.

8. I want to observe dogs being treated humanely, however, I am personally, aesthetically, emotionally, and profoundly disturbed when observing dogs treated and cared for inhumanely by individual retail dealers. Repeatedly, I have observed dogs that were subject to deplorable living conditions which has been an assault on my senses. I am concerned about the welfare of these animals because USDA does not require retail dealers to comply with the humane standards required under the Animal Welfare Act.

9. In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 7, 2001.

/s/ Bob Baker
BOB BAKER

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.
1:00-cv-01057 (CKK)

DORIS DAY ANIMAL LEAGUE, *et al.*,
Plaintiffs,

v.

ANN VENEMAN, Secretary of Agriculture, *et al.*,
Defendants.

DECLARATION OF PAUL POORE

I, Paul Poore, state:

1. Pug Haven Rescue Foundation is located at 23 South 16th Street, Kansas City, Kansas 66102. All information herein is based upon my personal knowledge.

2. I am the founder and a member of the Pug Haven Rescue Foundation. I founded this organization because I have a love and appreciation for the dog breed called pugs. I have an interest in seeing these dogs being cared for and treated humanely.

3. After learning that numerous pug breeders were providing their animals with inadequate food, water, shelter, and medical care, I founded this non-profit organization whose organizational mission is to rescue unwanted, abused, and neglected pugs. We purchase pugs from breeders that are found to provide inhumane care and treatment. The pugs are then rehabilitated so that they can be adopted by loving families. Many of the pugs rescues are from puppy mills. This term includes individual retail dealers who breed pugs on their own property and sell these animals to individuals.

4. Individual retail breeders who sell dogs for hunting, security, or breeding purposes or as pets are not covered under the United States Department of Agriculture's (USDA's) regulations so there are no regulations requiring that these animals receive humane care. As a result, members of the Pug Haven Rescue Foundation regularly visit breeders to observe the pugs and the conditions that these animals are being raised. So far, we have visited over twenty breeders. The majority of the puppy mill breeders that I have visited are raising dogs in deplorable conditions. For example, I have observed pugs living outside in small cages stacked on top of each other. The cages are not lined and as a result, when the dogs defecate it falls through to the dogs in the cages below. These dogs are dirty with rashes on their bodies, yeast infections in their ears, matted hair, and eye problems that can lead to blindness.

5. When I see the pugs in these conditions, they look at me with these sad faces as if they are saying, "get me out of here. Please help me." It breaks my heart to observe their suffering. The organization has a limited amount of space and resources so we can only purchase a few pugs that we observe are being abused and neglected. We currently have eight adult pugs and two puppies that we rescued and are currently caring for and rehabilitating.

6. To discourage rescuers from purchasing dogs from puppy mills, Missouri recently passed a law that taxes rescuers when they purchase a dog. The number of dogs suffering in puppy mills is significant because Missouri has more commercial dog breeders than any other state in the country. Kansas also has a large number of commercial breeders and thus, we also visit breeders in this state.

7. Unfortunately, the number of dogs in need of rescuing in Missouri and Kansas and throughout the country is ongoing. Last year, I contributed twenty three thousand

dollars of my own personal money to the organization in order to rescue and care for abused and neglected pups from puppy mills.

8. Individual retail dealers who sell dogs from their own residence are unregulated and profiting from breeding and raising dogs in inhumane conditions. By having only four female pug dogs, a breeder can make thirty to forty thousand dollars a year.

9. Once a pug is rescued from an inhumane breeder, I along with other members, help provide medical care, food, housing, attention, and finds homes for these animals. Many pugs from puppy mills fear human contact so I also help rehabilitate these animals so that they can socialize with humans and be placed in a foster home. We investigate the people who adopt these rehabilitated pugs because we want to insure that they go into a good home that can provide the special care that the dog may need.

10. From my experience, I have found that self regulation does not ensure a humane ethic or replace the goals of the Animal Welfare Act. Even when a dealer is affiliated with a dog organization such as the American Kennel Club, it does guarantee that the dealer is treating their dogs humanely.

11. Members of the Pug Haven Rescue Foundation receive newsletters and pictures of the new pugs rescued. The newsletters discuss the condition of the new pugs rescued and identifies the pugs recently adopted. We also provide educational information on our website, httpa/hometown.aol.com/pughavenrescue, that provides abroad range of information about puppy mills.

12. Not all individual retail breeders are motivated by profit and house their animals in inhumane living conditions. We visited one breeder who only has one male and one female pug and she does not breed them regularly for profit but rather only occasionally because she loves the breed.

These pugs are never outside in cages. Instead, they live in the house with the family and are given lots of love and attention. Good breeders are identified on the organization's website along with a list of breeders that should be avoided by people interested in purchasing a pug from a reputable breeder who raises pugs in humane conditions. Unfortunately, we have only found one pug breeder that we can recommend who raises these animals in humane conditions.

13. I am frustrated and upset over repeatedly observing pugs that have been inhumanely treated by large individual retail breeders not regulated by USDA. Due to USDA's illegal exclusion of all retail dealers, these breeders have no legal duty to adequately care for these animals and as a result, many pugs receive inhumane care and treatment by retail dealers. If USDA required individual retail dealers to comply with the Animal Welfare Act, they would be required by law to provide their dogs with adequate food, water, shelter, and veterinary care. Due to the continuous and ongoing abuse and neglect inflicted by many individual retail dealers, I have had to observe dogs subjected to inhumane care and treatment and expend a significant amount of time and money to rehabilitate and care for rescued pugs.

14. I want to observe and enjoy my contact with pugs, however, I am personally, aesthetically, emotionally, and profoundly disturbed when observing pugs treated and cared for inhumanely. Repeatedly, I have observed pugs that were subject to deplorable living conditions, which has been an assault on my senses. I am concerned about the welfare of these animals because USDA does not require individual retail dealers who sell dogs from their own residence to comply with the humane standards required under the Animal Welfare Act. Although I have tried to alleviate the suffering for some of the pugs, I can only do so much. There are pugs subjected to deplorable living conditions throughout the

country and unfortunately, the Pug Haven Rescue Foundation cannot inspect and ensure that all pugs intended as pets are provided with humane care.

15. In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 3-7-2001.

/s/ Paul Poore
PAUL POORE

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.
1:00-cv-01057 (CKK)

DORIS DAY ANIMAL LEAGUE, *et al.*,
Plaintiffs,

v.

ANN VENEMAN, Secretary of Agriculture, *et al.*,
Defendants.

DECLARATION OF JEFF LOCKETT

I, Jeff Lockett, state:

1. The Valley River Humane Society is located at 7450 US 19, Marble, North Carolina 28905. All information herein is based upon my personal knowledge.

2. I am a member and the Director of the Valley River Humane Society. I also serve as the animal cruelty investigator.

3. The organization seeks to minimize the growing dog and cat population by educating pet owners about the necessity of spaying and neutering and even subsidizes the cost of spaying and neutering for some pet owners. The organization also houses unwanted animals and seeks to educate children and breeders about the humane treatment of animals.

4. Unfortunately, a large part of my time is devoted to investigating puppy mill breeders which include retail breeders that are not licensed by the United States Department of Agriculture ("USDA") because they breed and raise these animals on their own property and sell directly to individuals.

5. I repeatedly receive calls from members and concerned citizens alerting us to the existence of puppy mills. These calls are usually from people who purchased a dog from abreeder and then discovered that the dog is suffering from an illness caused by the conditions at the puppy mill.

6. The number of puppy mills in this area is an ongoing problem. They keep spring-up. We keep discovering more and more breeders that are treating and caring for their animals inhumanely. Many of the individual retail breeders that we investigate sell hunting dogs. Hunting dogs are very popular in this area.

7. So far, I have investigated approximately twenty to thirty breeders. I have observed deplorable conditions at these puppy mills. For example, I have seen five to six dogs crammed into one filthy cage. The cages are usually off of the ground with a fenced flooring that is filled with feces. The cages are open, so the dogs are exposed to all types of weather. There is also usually no food or water. If there is water, it is green. Over the years, I have seen the same dogs still cooped up in a cage. Some of these dogs, the breeding dogs, are in cages for their whole life. Because the dogs at many individual retail dealers have been severely abused and neglected, they suffer from a variety of physical conditions including, malnutrition, dehydration, and skin ailments. Most of the dogs in puppy mills suffer from health problems yet do not receive any health care. Dogs from puppy mills also display emotional problems. For example, some are fearful or aggressive toward any type of human contact. Furthermore, many breeders will house several males with one female. This makes it impossible to determine which male dog is the father of the puppies.

8. It is very difficult convincing the state to prosecute a case of animal cruelty. The laws in this state are weak. The state must show a willful act of animal cruelty to fall within the felony charge. Ignorance is a defense. Most of the

breeders in this area claim that they do not know how to humanely care for these animals. Consequently, when I visit breeders who are raising dogs in deplorable conditions, I educate them on how to humanely care for these animals. Then, I monitor the dogs to see if the breeder is implementing my recommendations. It can take years to gather enough evidence to sufficiently show that the breeder is willfully failing to provide humane care to the animals.

9. The constituency of the Valley River Humane Society encompasses four counties located at the western tip of North Carolina. This is a very large area to cover but I do my best to monitor the breeders and the conditions that these dogs are being bred and raised.

10. Furthermore, even if we had enough evidence to prosecute the breeder, we have a limited amount of space and resources. Previously, we have seized dogs and attempted to rehabilitate them so that they can be adopted but unfortunately, the majority of animals living in deplorable conditions at individual retail breeders remain in these conditions. Many of the breeders in this area have over three hundred dogs. Our only recourse is to continuously monitor the conditions at the breeders and attempt to alleviate the inhumane treatment. We have spent approximately $ 88,000 a year monitoring and investigating puppy mills.

11. I am frustrated and upset over repeatedly observing dogs that have been inhumanely treated by individual commercial retail breeders not regulated by USDA. Due to USDA's illegal exclusion of all retail dealers, these breeders have no legal duty to adequately care for these animals and as a result, many dogs receive inhumane care and treatment by retail dealers. If USDA required individual retail dealers to comply with the Animal Welfare Act, they would be required by law to provide their dogs with adequate food, water, shelter, and veterinary care. Due to the continuous and ongoing abuse and neglect inflicted by many individual retail

dealers, I have had to observe dogs subjected to inhumane care and treatment. Furthermore, the Valley River Humane Society has had to devote a significant amount of time and expend a large amount of money to investigate individual retail dog dealers.

12. I want to observe dogs being treated humanely, however, I am personally, aesthetically, emotionally, and profoundly disturbed when observing dogs treated and cared for inhumanely by individual retail dealers. Repeatedly, I have observed dogs that were subject to deplorable living conditions, which has' been an assault on my senses. I am concerned about the welfare of these animals because USDA does not require individual retail dealers to comply with the humane standards required under the Animal Welfare Act. Although I have tried to alleviate the suffering for some dogs, the Valley River Humane Society can only do so much.

13. In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 3/21/2001.

/s/ Jeff Lockett
JEFF LOCKETT

APPENDIX N

* * * *

that will help us determine the appropriate total n~ .per of breeding female dogs and/or cats that a person may maintain on his or her premises and continue to be exempt from licensing requirements.

We are considering these changes to the regulations to ensure the humane handling, care, and treatment of dogs and cats, while concentrating our regulatory efforts on those facilities that present the greatest risk of noncompliance with the regulations.

b. Is this program new or continuing? If continuing, what, significant changes will there be in program operations as a result of this action?

This program is part of a continuing effort to identify those areas that, based on our knowledge and experience implementing the AWA, present the most risk to animals. It the definition of "retail pet store" Were revised, many pet retailers now exempt from licensing and inspection requirements would have to be licensed and inspected. Because this change could severely strain available Federal resources for carrying out inspections and other enforcement activities under the AWA, we are considering increasing the total number of breeding female dogs and/or cats that a person may maintain on his or her premises and be exempt from licensing and inspection requirements.

If this number were increased, some dealers who would no longer qualify as retail pet stores under the revised definition of "retail pet store" would continue to be exempt from licensing and inspection requirements, and some pet wholesalers who are currently required to be licensed would no longer have to be licensed.

C. briefly discuss the issues associated with the rule-making. For example, impacts (both benefits and costs); effects on other Federal agencies and state and local governments (if any, also state whether you have consulted with them in developing this rulemaking); effects on small entities; budgetary effects (e.g., outlays, number of years and awards, administrative overhead); alternatives considered; time pressures (state here if docket needs to be published by a specific date and why); why the regulatory action is ir; octant, sensitive, controversial, or precedential.

In accordance with the AWA, retail pet stores are exempt from the licensing and inspection requirements in 9 CFR part 2. Other retail and wholesale pet dealers must be licensed in accordance with the regulations. The definition of retail pet store was established to ensure that the appropriate retail facilities were exempted from licensing requirements. However, that definition has prompted a regulatory interpretation of "retail pet store" that includes all retail outlets, regardless of volume, size, or location of business. As such, under the current definition of retail pet store, a very large number of facilities that are not traditional retail pet stores are exempt from licensing requirements.

To ensure that dogs and cats at these outlets receive humane handling, care, and treatment, we are considering amending the definition of "retail pet store" to limit retail pet stores to only traditional "stores"—nonresidential, commercial, retail businesses that sell, primarily pets and pet, . products. If this change were adopted, many retail pet dealers would no longer be considered retail pet stores, and, unless otherwise exempt under the regulations, would have to be licensed and inspected in accordance with subpart A of 9 CFR part 2.

(2)

Supreme Court, U.S.
FILED
AUG 13 2003
CLERK

No. 02-1807

In the Supreme Court of the United States

DORIS DAY ANIMAL LEAGUE, ET AL., PETITIONERS

v.

ANN VENEMAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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11 pp

QUESTION PRESENTED

Whether the Department of Agriculture reasonably interpreted the statutory term "retail pet store" in the Animal Welfare Act, 7 U.S.C. 2132(f)(i), to include residential retail dog sellers.

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In the Supreme Court of the United States

No. 02-1807

DORIS DAY ANIMAL LEAGUE, ET AL., PETITIONERS

v.

ANN VENEMAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-31a) is reported at 315 F.3d 297. The opinion of the district court (Pet. App. 1a-22a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 2003. A petition for rehearing was denied on March 14, 2003 (Pet. App. 32a). The petition for a writ of certiorari was filed on June 12, 2003. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Animal Welfare Act (AWA), 7 U.S.C. 2131 *et seq.*, requires certain dealers to obtain a license from

the Secretary of Agriculture in order to buy or sell animals. Under the AWA, the term "dealer" means:

> any person who, in commerce for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—
>
> > (i) *a retail pet store* except such store which sells any animals to a research facility, an exhibitor, or a dealer; or
> >
> > (ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year [.]

7 U.S.C. 2132(f) (emphasis added).

The AWA does not define the term "retail pet store." Pursuant to the Secretary's authority to promulgate regulations under the AWA, see 7 U.S.C. 2151, the Secretary has issued a regulation defining a "retail pet store" as "any outlet" where certain animals, including dogs, "are sold or offered for sale, at retail, for use as pets." 9 C.F.R. 1.1. Since 1971, the Secretary has interpreted the regulation to mean that the term "retail pet stores" encompasses residences from which such animals are sold as pets. 36 Fed. Reg. 24,919.

On March 25, 1997, the Secretary sought public comment on a petition for rulemaking filed by petitioners to exclude residential dog sellers from the Secretary's regulation defining a retail pet store. 62 Fed. Reg.

14,044. On July 19, 1999, the Secretary issued a decision declining to narrow the definition of a retail pet store. 64 Fed. Reg. 38,546.

2. Petitioners subsequently brought suit in the United States District Court for the District of Columbia, challenging the Secretary's decision not to amend the regulatory definition. The court held that the Secretary's interpretation of the term "retail pet store" to include residential dog sellers conflicts with the plain meaning of the provision. Pet. App. 11a-12a.*

3. The court of appeals reversed. Pet. App. 23a-31a. The court held that the AWA is ambiguous and that the Secretary permissibly interpreted the statute to exempt residential retail dog sellers from its coverage. The court of appeals explained that, although "[o]ne usually thinks of a store as a business open to the public and engaged in the sale of goods[,] * * * not all stores are open to the public and not all stores are located in shopping malls or other typical business locations." *Id.* at 25a. The court of appeals concluded that, "[w]hile the regulation's definition of 'retail pet store' does not exactly leap from the page, there is enough play in the language of the Act to preclude [the court] from saying that Congress has spoken to the issue with clarity." *Id.* at 29a.

The court of appeals also observed that, "in the years since passage of the Act and the Secretary's adoption of the regulation, Congress has not altered the regulatory definition of 'retail pet store' although it has amended the [A]ct three times." Pet. App. 29a. The court

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* The district court also dismissed for lack of jurisdiction petitioners' challenge to the Secretary's policy of exempting retail sellers of hunting, breeding, and security dogs from regulation under the AWA. Pet. App. 17a-20a.

concluded that "the Secretary's decision and policy statement declining to modify the regulation is supported with reasoning that is persuasive and faithful to the Act's purpose of protecting animal welfare." *Ibid.*

ARGUMENT

1. Petitioners argue (Pet. 8-20) that the court of appeals erred in upholding the Secretary's longstanding regulation construing the phrase "retail pet store" to include residential dog sellers. The court of appeals' decision upholding the regulation, however, does not conflict with any holding of this Court or of any other court of appeals. Further review by this Court is accordingly not warranted.

Moreover, the court of appeals correctly held that the Secretary permissibly construed the term "retail pet store" to include residences from which dogs are sold at retail to ultimate consumers as pets. The Act itself exempts from the statute a "retail pet store," without defining that phrase. 7 U.S.C. 2132(f)(i). The Secretary permissibly exercised her broad rulemaking authority (see 7 U.S.C. 2151) to interpret the phrase to encompass establishments other than traditional pet stores. The word "store" is ambiguous and does not compel a meaning that is limited to commercially zoned establishments, as contended by petitioners (Pet. 17-19). As the court of appeals reasoned:

> One usually thinks of a store as a business open to the public and engaged in the sale of goods. But not all stores are open to the public and not all stores are located in shopping malls or other typical business locations. If a homeowner raised dogs; set up a separate place on his property—say, for instance, a small building; installed a counter and a cash register; displayed leashes, collars, and other dog para-

> phernalia for sale; and advertised the sale of puppies at his address, it would not be much of a stretch to view this too as a store.

Pet. App. 25a. Thus, nothing in the plain meaning of the term "retail pet store" precluded the Secretary from construing that term to include "any outlet" where certain animals, including dogs, "are sold or offered for sale, at retail, for use as pets." 9 C.F.R. 1.1. To the contrary, the Secretary's regulation conforms to the accepted definition of the term "retail store." See *Webster's Third New International Dictionary* 1938 (1993) (defining "retail store" as "a place of business usu. owned and operated by a manufacturer or by someone other than a retailer in which merchandise is sold primarily to ultimate consumers").

The Secretary's interpretation has been in effect since 1971, and Congress has not seen fit to alter that interpretation despite its willingness during that period to amend the AWA in other respects to achieve its policy goals. Pet. App. 29a. "[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)).

Contrary to petitioners' suggestion (Pet. 14-15), the Secretary's interpretation does not render superfluous the exemption in Section 2132(f)(ii) for "any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat and who derives no more than $500 gross income from the sale of other animals during

any calendar year." 7 U.S.C. 2132(f)(ii). That exemption applies to all persons falling within the terms of that provision, including those who sell at *wholesale.* By contrast, the Secretary's retail pet store regulation is limited to sellers of pets at *retail.* For similar reasons, petitioners err in relying (Pet. 15) on the reference in 7 U.S.C. 2133 to "any retail pet store or other person" to suggest that Congress distinguished between retail pet stores and retail residential sellers. The agency's regulation does not equate a retail pet store with any "person," which under the AWA includes any entity. 7 U.S.C. 2132(a). Rather, the Secretary's regulation is limited to outlets that sell pets at retail. 9 C.F.R. 1.1.

2. Petitioners also contend (Pet. 10-12, 15-16) that the Secretary's regulation undermines the AWA's purpose to protect animal welfare. The court of appeals properly found, however, that "the Secretary's decision and policy statement declining to modify the regulation is supported with reasoning that is persuasive and faithful to the Act's purposes." Pet. App. 29a. Specifically, the Secretary concluded in her decision "that a change to the definition of 'retail pet store' would not improve animal welfare in general or [the agency's] current regulatory program." 64 Fed. Reg. at 38,547. The Secretary explained that, unlike wholesale dealers, "retail dealers, especially those who sell from their homes, are already subject to a degree of self-regulation and oversight by persons who purchase animals from the retailers' homes, as well as by breed and registry organizations." *Ibid.*

The Secretary also observed that regulation of residential sellers would require the agency to spend a disproportionate amount of resources "to regulate a very small fraction of the animals covered under [the

Secretary's] regulations," and therefore would divert the agency's resources from "those facilities that present the greatest risk of noncompliance with the regulations." 64 Fed. Reg. at 38,547. The Secretary was also reasonably influenced by the potential invasions of privacy that would result if federal inspectors began enforcing "cleaning, sanitation, handling, and other regulatory requirements in private homes." *Ibid.* The court of appeals correctly found that those policy considerations were "reasonable" and consistent with the Secretary's responsibility to administer the AWA "to fulfill the purpose of the Act as effectively as possible." Pet. App. 30a, 31a.

3. Petitioners also argue (Pet. 20-21) that the court of appeals' decision threatens to subject residential sellers of products to local laws and regulations that govern traditional commercial establishments. That contention is without merit. The court of appeals simply held that the Secretary had permissibly construed the term "retail pet store" in the AWA to encompass residential dog sellers. The court did not suggest, much less hold, that private residences from which dogs are sold must be equated with commercial establishments for other purposes. Indeed, petitioners do not argue that the panel's decision has resulted in any regulation of such private residences. Further review by this Court is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

DORIS DAY ANIMAL LEAGUE, *et al.*,
Petitioners,

v.

ANN VENEMAN, Secretary
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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I. USDA FAILED TO DEMONSTRATE THAT THE COURT OF APPEALS' OPINION IS CONSISTENT WITH SUPREME COURT PRECEDENT

As demonstrated in petitioners' earlier brief, the court of appeals' opinion creates a new judicial review standard that is in direct conflict with Supreme Court precedent. USDA's brief in opposition to certiorari fails to refute this argument and, in turn, is unable to cite to Supreme Court precedent to support the court of appeals' method of reviewing this case.

A. The Court Of Appeals' Decision Conflicts With Supreme Court Precedent For Determining The Plain Meaning Of Statutory Terms

The court of appeals' decision reviewed whether USDA's definition of "retail pet store" is "possible" rather than thoroughly reviewing the plain meaning of the AWA. *Doris Day Animal League v. Veneman*, 315 F.3d 297, 298 (D.C. Cir. 2003), Pet. App. at 25a. USDA was unable to defend this novel method of reviewing statutory terms because the court of appeals' opinion directly conflicts with longstanding Supreme Court precedent for reviewing the plain meaning of statutory terms. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). If the court of appeals had thoroughly reviewed the plain meaning of the AWA language, then the court would have had no choice but to find that Congress intentionally chose the wording of the statute to differentiate between "retail pet stores" and individuals who sell pets retail from their own homes.[1] Rather than reviewing

---

[1] In a misguided attempt to justify the agency's overly broad definition of "retail pet store," USDA sets forth a confused reading of the AWA's licensing provision of dealers. USDA states that the "agency's regulation does not equate a retail pet store with any "person." Res't Br. at 6. This is a clear misreading of the law. Under the AWA, a "person" includes "any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity." 7 U.S.C. § 2132(a) (2000). Although USDA tries to argue that a "retail pet store" is not a person, the

the language of the AWA to determine the plain meaning of "retail pet store," 7 U.S.C. § 2132(f) (2000), the court of appeals ignored the standard of review this Court established in *Chevron* and deferred to USDA's interpretation.

B. The Court Of Appeals' Decision Creates A New Standard For Determining Whether An Agency Acted Reasonably In Construing Statutory Terms

The court of appeals' decision is based solely on a review of the "reasonableness" of USDA's policy justifications for exempting thousands of puppies from the protections of the AWA. Contrary to Supreme Court precedent, the court failed to examine the fair and ordinary meaning of the term "retail pet store." *See AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 389-90 (1999).[2] No one equates a "retail pet store" with a home.

AWA broadly defines person to include legal entities that are stores (companies, corporations, etc.) and individuals. Moreover, in the licensing provision, Congress differentiates between a retail pet store and individuals who sell animals, by using the language "retail pet store or *other person*" who breeds dogs or cats on his own premises. *Id.* § 2133 (2000) (emphasis added). Congress clearly intended individuals who sell dogs from their home to fall within the meaning of "other person" not within the meaning of "retail pet store." For an in-depth discussion of this argument, *see* Pet. For Writ Of Cert. at 13-15.

[2] The court of appeals' reliance upon USDA's resource allocation argument also conflicts with Supreme Court precedent. There is no excuse for illegally excluding a whole class of pet dealers from regulation based upon an agency's resource priorities. Nowhere in the AWA does Congress give USDA unlimited discretion to exclude all retailers because it would rather use the money on another program. Instead, "the Supreme made clear in Iowa Utilities Board, the FCC cannot reasonably blind itself to statutory terms in the name of efficiency. *Chevron* deference does not bow to such unbridled agency action." *GTE Serv. Corp. v. Fed. Communications Comm' n*, 205 F.3d 416, 423-24 (D.C. Cir. 2000) citing *Iowa Util. Bd.*, 525 U.S. at 389.

The court of appeals even apparently recognizes the distinction between a store and a private home. In describing a "retail pet store," the court of appeals distinguishes between the selling of dogs from a residence and a store. *Veneman*, 315 F.3d at 298. The court cites as a hypothetical retail pet store, a building separate from the home where dogs are advertised for sale. Inside the building, there is a cash register, leashes, collars, and other dog paraphernalia. *Id.* From this example, the court of appeals understands that a store is a commercial establishment that is separate from a home and accessible to the public. The court of appeals also states that the local zoning authority would likely recognize this building as a store. *Id.* By contrast, a residential retailer that raises dogs in a basement is not a commercial establishment accessible to the public and would likely not be recognized by the zoning authority as a store. In addition, the court notes that the regulation of individuals selling pets from their private homes could lead to "potential invasions of privacy" as a result of federal inspections. *Id.* at 301. Clearly, a "retail pet store" would not have the same expectation of privacy as a private home.

Not only does the court of appeals appear to recognize the difference between a home and a "retail pet store," but also USDA admits that its regulatory definition of "retail pet store" is not the common and ordinary meaning of the term. Pet. App. at 114a (explaining that their regulatory interpretation of "retail pet store" includes "a very large number of facilities that are not traditional pet stores."). Clearly, both USDA and the court of appeals appear to recognize the ordinary and common meaning of the term "retail pet store" and the only justification given for permitting the broad regulatory definition of this term is based upon policy considerations. This new standard for assessing the reasonableness of agency interpretations is contrary to Supreme Court precedent because it grants agencies extraordinary power and unlimited discretion. This standard

should not be allowed to stand as new precedent for assessing the reasonableness of an agency's regulatory definition.

USDA also points to the court of appeals' reliance upon the agency's longstanding interpretation of the AWA to demonstrate that their definition of "retail pet store" is reasonable. Contrary to USDA's brief, the fact that Congress has amended the AWA but has not repealed the agency's rule does not demonstrate that Congress in any way endorses the agency's definition. There is no evidence, and USDA has provided none, that Congress even considered the "retail pet store" definition when amending the AWA. *See Veneman*, 2001 U.S. Dist. LEXIS 23439 (D.D.C. 2001), Pet. App. at 14a-15a. The court of appeals is attempting to resurrect a line of cases on this subject, including *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982), that this Court has criticized. *See Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (criticizing *Curran*). This Court clarified that when Congress makes isolated amendments to a statute, "[I]t is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." Id. citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 175, n.1 (1989). This Court has clearly stated the rule for interpreting Congressional inaction yet the court of appeals' opinion attempts to knowingly blur this Court's holding. The Supreme Court should not allow the court of appeals to change this Court's precedent.

II. THE EFFECT OF THE COURT OF APPEALS' DECISION IS NOT CONSISTENT WITH THE PURPOSE OF THE ANIMAL WELFARE ACT

In an attempt to rationalize their failure to ensure that animals intended to be used as pets are provided humane care and treatment, 7 U.S.C. § 2131(b)(1) (2000), USDA claimed that others were performing at least some policing of puppy mills. They pointed to the work of breed groups, humane

societies, and the action of a small number of states. Unfortunately, the court deferred to this specious rationale. *See Veneman*, 315 F.3d at 301. Congress did not give USDA the authority to ignore its statutory responsibilities because a few states and humane societies are stepping forward to rescue dogs from puppy mills.[3] Nor has the USDA made any showing whatsoever that the policing of puppy mills by these organizations, individuals and some states is comprehensive, consistent or effective. By ignoring the purpose of the AWA, the court of appeals' decision allows puppy mills and other residential retailers to profit from raising animals in deplorable conditions. In addition, this exemption is much broader than Congress intended and as a result, may have the unintended effect of subjecting individuals who sell items from the home to invasion of privacy and regulatory hardship.

A. The Court Of Appeals' Decision Eliminates Animal Welfare Protection For All Animals Sold Retail

The Supreme Court has never reviewed an AWA case. Because the court of appeals has severely gutted the protections of the AWA, this case is a prime candidate for review. In a single decision, animal welfare protection is being eliminated for *all* pets sold retail. This arbitrary amputation of the AWA's scope of protection is in direct conflict with the purpose of the statute.

The legislative intent of the 1970 amendment to the AWA was to expand "the perimeters of its protection to more animals and to more people who handle, exhibit, buy or sell,

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[3] *See* Baker Decl., Pet. App. at 102a (explaining that from his experience as a puppy mill investigator, "self-regulation does not guarantee a humane ethic or replace the goals of the Animal Welfare Act, even when the dealer is affiliated with a dog organization. In particular with the American Kennel Club, their main function is not to report inhumane conditions, but rather to guarantee the parentage of the animal. A big source of their income involves the registering of dogs.").

or transport them or who use them in the pursuit of medical and scientific knowledge." H.R. Rep. No. 91-1651, *reprinted in* 1970 U.S.C.C.A.N. 5103, 5104. Rather than providing AWA protection for more animals, the court of appeals' decision severely restricts and frustrates the broad protection Congress provided for animals intended to be used as pets. *See Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)(explaining that courts must reject administrative constructions of a statute that are "inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."). Under the ruling, the exemption of all retail dealers from AWA humane care and treatment requirements has caused, and continues to cause, terrible suffering for untold thousands of puppies and other pet animals.

B. The Court of Appeals' Decision Creates Two Different Classes Of Breeders

USDA's arbitrary expansion of the definition of "retail pet store" to include all retail dealers including those selling dogs from their private homes results in significant economic harm to wholesale breeders. By arbitrarily exempting all retail breeders from AWA compliance, the USDA has improperly created two classes of breeders, the regulated class (wholesalers) and the unregulated class (residential retailers). This results in unlawful discrimination against wholesalers. Wholesalers are subject to all of the time and cost burdens concomitant with comporting their operations to AWA licensing and humane care and treatment requirements, while residential retailers completely escape all AWA regulations and the associated costs. This discrimination against wholesalers is completely unfounded and contrary to any reasonable policy goal in enforcing the AWA. Both the regulated class (wholesalers) and the unregulated class

(residential retailers) sell large volumes of dogs.[4] *See* Wilkes-Myers Decl., Pet. App. at 85-87a (explaining that an unregulated dealer had 253 dogs); Curry Decl., Pet. App. at 90a (stating that an unregulated dealer had 400 dogs); Holland Decl., Pet. App. at 99a (describing one dealer has having 130 animals). Therefore, in terms of fulfilling the AWA's mandate for humane treatment of animals, there is no basis for this discrimination against the wholesale dealers. The only difference between the regulated class and the unregulated class is that the regulated class sells animals to pet stores while the unregulated class sells directly to consumers. This distinction is not relevant to the treatment of the animals and nowhere in the AWA is there language which sanctions this discrimination against wholesalers.

As noted *supra*, the only exemption in the AWA is for "retail pet stores." There is logic to Congress specifically exempting these stores. "Retail pet stores" are generally not in the business of breeding animals. Instead, these stores receive animals from wholesale breeders, the regulated class, and thus, there is assurance that these animals have been bred and reared in compliance with AWA licensing and humane treatment requirements prior to reaching the pet store. In addition, "retail pet stores" are open to the public which can scrutinize the animal's living conditions. Thus, the welfare of the animals in pet stores is guaranteed by wholesale suppliers being regulated and the fact that commercial establishments are subject to public scrutiny.

The logic behind the exemption for "retail pet stores" does not apply to residential retailers. Unlike "retail pet stores," this unregulated class does not receive dogs from regulated dealers, but rather breeds dogs to sell just as the regulated wholesale breeders do. Yet, because of the USDA's extend-

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[4] If USDA limited its retail pet store definition to require residential retailers to be licensed, small show and hobby breeders would be exempt from regulation. *See* 9 C.F.R. § 2.1(3)(iii)(2003).

ing the "retail pet store" exemption to these residential retailers, the retail breeders completely escape regulation. Additionally, unlike commercial pet stores, the unregulated residential retailers are not open to public scrutiny. These dealers raise animals stacked in cages in their backyards, basements, or barns out of public view. The animals are then sold through the newspaper or the internet. The public never has a chance to view the living conditions of the animals. *See* Baker Decl., Pet. App. at 102a (stating that "it is completely erroneous to suggest that individual retail dealers are not part of the puppy mill problem. Furthermore, investigating unlicensed retail dealers who breed and sell animals from their own property can be difficult because these dealers are not open to the public and therefore are not easily accessible."). Thus, while the AWA exemption for "retail pet stores" is based in sound policy, the USDA's illegal extension of this exemption to residential retailers is legally incoherent in that the welfare of these retailer's animals is neither controlled by any regulated breeder or scrutinized by public oversight.

Wholesale dealers are economically harmed in yet another way by USDA's arbitrary exemption of residential retailers from the AWA. Not only does the unregulated class profit from avoiding the cost of AWA compliance, but also this very often results in residential retailers raising animals in deplorable conditions. The news media has widely publicized the terrible conditions at these puppy mills. Fortunately, these stories have brought attention to the puppy mill problem. Unfortunately, because the public makes little distinction between wholesalers and retailers, the regulated wholesalers are being tarred with the same media brush as the unregulated residential retail dealers. As a result, the entire breeding industry then suffers from extremely poor public perception. If, as was intended by the AWA, the unregulated class followed the same humane care and treatment standards as the regulated class, then much of the puppy mill problem

would be eliminated, and the industry would avoid the public relations problems and resulting economic harm brought about by continuing exposes of puppy mills.

In sum, USDA's *ultra vires* action in creating different classes of breeders/dealers should not be allowed to stand. The unlawful distinction between the regulated class (wholesalers) and the unregulated class (residential retailers) is meaningless and fundamentally frustrates the purposes of the AWA by economically discriminating against wholesale breeders, besmirching the public perception of the entire industry and excluding large numbers of animals from AWA protections.

C. The Court Of Appeals' Decision May Cause People Who Sell Retail From Their Homes To Be Subject To Invasions Of Privacy And New Regulations

The court of appeals' decision specifically equates "homes" and "residences" with "retail stores," finding no meaningful legal definitional distinction between these terms. *See Veneman*, 315 F.3d 297. Not only does this finding defy the AWA and the commonly understood usage of these terms, it also could subject untold numbers of individuals who sell items from their home to invasion of privacy and numerous regulations that cover commercial "retail store" establishments such as, zoning, licensing, and sanitation standards.[5] For example, under USDA and the court of appeals' logic, a hobby craftsman who occasionally sells crafts from the home may be surprised to discover that his home is labeled as a "retail store." Clearly, equating the legal status of private homes with commercial businesses could create significant hardship for many homeowners and unprecedented confusion in a number of commercial and privacy law areas.

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[5] As stated supra, the court of appeals recognizes that a store may be subject to the local zoning authority. *Veneman*, 315 F.3d at 298.

USDA's brief attempts to blunt this significant legal problem created by the court of appeals' opinion in two ways. First, USDA states that the court did not hold that private residents "*must* be equated with commercial establishments" for all purposes (emphasis added). Resp't Br. at 7. Next, USDA notes that petitioners have not presented any examples of the how the opinion has resulted in regulation of such private residences. *Id.* As for the USDA's first argument, petitioners do not claim that the court's opinion holds that all private residences "must" be equated with commercial businesses, but rather that the court finds that there is no useful legal distinction between these terms. It should be noted that the court does not limit this equating of homes with retail stores solely to the AWA, but rather finds its purported support in "possible" dictionary meanings of the terms. *Veneman*, 315 F.3d at 289-299. Therefore, the court's finding could well create important and unfortunate precedent that could be used by regulators at the local, state, or federal levels to regulate private residences as commercial businesses. While it is true that no such cases have yet occurred, this is hardly comforting in that it has only been a few months since the opinion was issued. The USDA has completely failed to refute petitioners' argument that the court's opinion creates legal confusion and potential hardship for an incalculable number of individuals selling items retail from their private homes. Therefore, the Supreme Court should grant review of this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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